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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 620

LAURA S. K. SLOCUM, A. COHN and MERWIN M. HART,

Petitioners,

vs.

FIRST NATIONAL BANK OF CHICAGO, JOHN C. MEINERS and JOHN C. PARTRIDGE, individually and as members of a Bondholders' Protective Committee under a Deposit Agreement dated December 31, 1931, A. HARRIS, M. ROTHSCHILD, H. H. BAUM, SECURITY NATIONAL BANK OF SHEBOYGAN, WISCONSIN, as Trustee under the Last Will and Testament of Joachim Johann, and A. C. ALLYN & CO., a Delaware Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND BRIEF IN SUPPORT THEREOF

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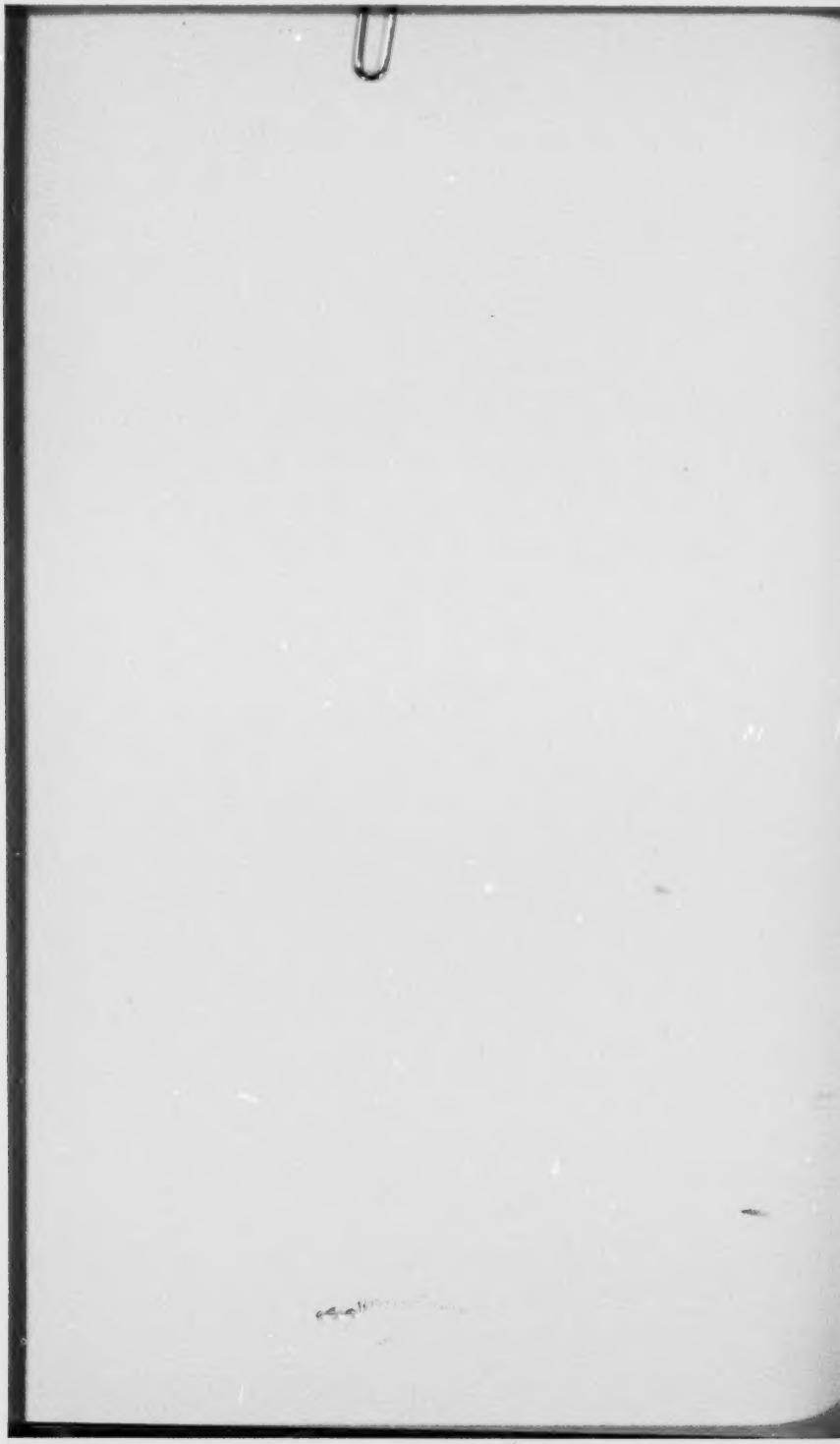

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Laura S. K. Slocum, A. Cohn and Merwin M. Hart, pray the issuance of a Writ of Certiorari to review the judgment of the Appellate Court of Illinois

for the First District whose judgment was made final by the denial of leave to appeal by the Supreme Court of Illinois.

Statement of the Matter Involved.

The primary question presented for review is the decision of the Appellate Court of Illinois sustaining the defense of *res adjudicata* based on a decree in an alleged class action where the interest of the petitioners was adverse to that of the alleged representative of the class and from which action petitioners were deliberately excluded as parties. By that action petitioners were denied due process guaranteed by the Fifth and Fourteenth Amendments to the Federal Constitution. There is also involved the action of the court in sustaining another defense of *res adjudicata* based on 77B proceedings on subject matters which were not within the jurisdiction of that court. In sustaining such a defense petitioners were denied due process.

The decree in the class action adjudicated that the officers of the mortgagor corporation who guaranteed its bond issue in the amount of $1,500,000 were released from their liability (R. 14-19).* Petitioners, who were known to the representatives in the class action as opposing such release, were excluded as parties. One of the petitioners, Slocum, had procured a judgment based on the guaranty which was affirmed by the Appellate Court (296 Ill. App. 362) and which was then in full force and effect. She was denied admission as a party (R. 31). The decree which adjudicated her rights, without letting her in as a party, was thereafter pleaded in satisfaction of her judgment (R. 19). The other petitioners, holders of bonds who were known to the representative in the class action that they opposed the re-

* The reference is to the abstract of the record.

lease of the guaranty, were not made parties. The decree in such a class suit was pleaded in bar and sustained, to the suit which sought the enforcement of the guaranty. The suit also involved a cause of action against the Mortgage Trustee and Bondholders' Protective Committee for malfeasance and misfeasance (R. 20-38). The trial court also sustained a defense to this action based on a plea of *res adjudicata* by reason of the 77B proceedings. The judgment of the trial court was affirmed by the Appellate Court (R. 59) and leave to appeal was denied by the Supreme Court of Illinois.

The opinion (pp. 1-2)* states that the matter was disposed of below by a reference to a Master "who took evidence and reported, recommending that the Amended Complaint filed February 1, 1939, be dismissed" and that "the Chancellor approved the report and sustained the motions to dismiss." This is an inaccurate statement. No reference was had. No report was given. The matter was disposed of by the court on the pleadings when it sustained the motions to dismiss (R. 57, 58).

Questions Presented.

1. Whether petitioners were deprived of due process of law guaranteed by the Fifth and Fourteenth Amendments to the Federal Constitution when the court sustained the defense of *res adjudicata* by reason of the decree in the class action to which petitioners were excluded as parties and whose interest were adverse to the alleged representatives of the class.

2. Whether the order in the 77B proceeding was properly pleaded in bar to petitioners' action against the Trustee and the Bondholders' Protective Committee for malfeasance and misfeasance which matters were not

* The opinion is printed in the petition for leave to appeal which is included in the record (p. 2).

dischargeable in bankruptcy and which were not within the jurisdiction of the Bankruptcy Court when it passed on the Reorganization Plan, and thereby petitioners were deprived of due process of law.

Reasons for the Allowance of the Writ.

1. The decision of the Appellate Court that a void decree may be pleaded in bar (if not appealed by persons who were not parties to the proceedings and not fairly represented in the alleged class action) is in conflict with the most recent decision of this court which reversed the highest court of Illinois on a similar proposition (*Hansberry* v. *Lee,* 85 L. ed. p. 11).

2. The judgment of the State Court is challenged for want of due process and this court will exercise its discretionary power to examine the course of the proceedings as to ascertain whether petitioners were accorded due process (*Hansberry* v. *Lee, supra*).

3. The question whether an adjudication in 77B proceedings in excess of jurisdiction may be pleaded in bar to an action against Trustees for malfeasance deserves the exercise of the discretionary power of this court to issue the writ.

4. The decision in the instant case that judgments or decrees procured by fraud and collusion or without jurisdiction may be pleaded in bar to an action by a stranger to the proceeding and that such judgments are not subject to collateral attack is contrary to the fundamental law of the land and to the accepted procedure, and the Writ should be awarded.

Prayer for Relief.

Wherefore, the above petitioners pray the allowance of a Writ of Certiorari to the Appellate Court of Illinois, First District, to the end that the cause herein may be

reviewed and decided by this court and that its judgment be reversed with directions to reverse the order of the Superior Court of Cook County and to rule on the respondents to answer petitioners' complaint.

MEYER ABRAMS and
LEO L. GINSBURG,
Attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION.

I.

Opinion Below.

The opinion below was reported in abstract form only (305 Ill. App. 488) and appears in full in the petition for leave to appeal (pp. 1-9) which is part of the record (p. 2). The Supreme Court of Illinois denied leave to appeal on October 16, 1940, without any opinion.

II.

Jurisdiction Invoked.

The judgment of the Appellate Court was entered on May 20, 1940 (R. 59), and the Supreme Court of Illinois denied leave to appeal on October 16, 1940.

The statutory provision under which the jurisdiction is invoked is under Section 237b of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 936, 937 (28 U. S. C. A. Sec. 344b).

The Federal question was raised by the complaint (R. 28, 36) which also attacked the class action as void for want of jurisdiction (R. 33-34). It was also raised defensively by the plea of *res adjudicata* based on the 77B proceedings (R. 42, 43) and such defense was considered and sustained by the court in its opinion (pp. 5-6).

The authorities believed to sustain the jurisdiction are as follows:

(a) The decision of the Appellate Court made final by the denial of leave to appeal is subject to review here on certiorari.

Minneapolis & St. Paul, et al. v. *Rock,* 279 U. S. 410.

Pennsylvania R. Co. v. *Illinois Brick Co.,* 297 U. S. 447.

(b) The order sustaining the defense of res adjudicata based on the 77B proceedings brings this case within Section 237b for review by certiorari.

Cumberland Glass Co. v. *DeWitt,* 237 U. S. 447.

Indiana v. *Brand,* 303 U. S. 95.

Stoll v. *Gottlieb,* 305 U. S. 165.

We quote the following from the *Cumberland* case *supra* (p. 449):

> "Summing up the defenses made in the state court, the Maryland Court of Appeals said (120 Maryland, 386) 'The defendant interposed three pleas—first that it did not commit the wrong alleged; secondly, limitations; thirdly *res adjudicata,* based upon certain proceedings had in the United States District Court for Maryland, and particularly set out in the pleas!
>
> "The Federal question, which is the basis of jurisdiction here, arises upon the plea of *res judicata* to which a demurrer was sustained in the Maryland court of original jurisdiction which judgment was affirmed by the Court of Appeals. This presents a Federal question because the plea of former judgment in a Federal court adjudicating a right of Federal origin, asserts a right which if denied made the case reviewable here under Sec. 709, Revised Statutes, Sec. 237, Judicial Code. *Deposit Bank* v. *Frankfort,* 191 U. S. 499."

See also Robertson & Kirkham on Jurisdiction of the Supreme Court, page 28, Section 15, Note 12, citing *Nutt* v. *Knut,* 200 U. S. 12, on the proposition that the Federal question may be raised defensively.

(c) The action of the court in sustaining the defense of res adjudicata based on the decree in the alleged class action from which the petitioners were excluded as parties and not fairly represented raised a Federal question as a denial of due process under the Fourteenth Amendment.

Scott v. *McNeal,* 154 U. S. 34.
Simon v. *Southern Railway,* 236 U. S. 115.
Paleo v. *Connecticut,* 302 U. S. 319.
Hansberry v. *Lee,* 85 L. ed. p. 11.

(d) The Federal question was properly raised.

No particular words are necessary to raise the Federal question and the question is sufficiently raised if it appears from the nature of the pleadings that a federal right was before the court for a decision (*St. Louis, et al.* v. *Starbird,* 243 U. S. 592, 597). This appears from the complaint (R. 36, par. 17). It appears from the defense (R. 42, 43) and from the opinion (pp. 5-6).

III.

Statement of the Case.

The bond issue of $1,500,000 executed by the mortgagor corporation was guaranteed by its officers (R. 33) and was further secured by preferred stock of the Harris Brothers Company of a par value of $845,600 (R. 1, 2) under an express trust to enforce the guarantee and

the pledge (R. 3). From 1932 to 1938 the mortgagor defaulted and no action was ever taken by the Trustee to protect the bondholders. The default in interest alone from 1932 to 1938 was about $500,000. Taxes from 1928 to 1938 were unpaid, and they aggregated $267,979.06 (R. 47). The guarantee on the bond issue provided that upon a reduction of the bond issue to $1,000,000 the liability of the guarantors should cease. In order to be released from the guarantee one of the guarantors (M. Rothschild) purchased, subsequent to said default, $143,200 of the defaulted bonds at 10 cents on the dollar and tendered them to the Trustee for cancellation in order to reduce the bond issue to $1,000,000 and be released from the guarantee. He did not tender the unpaid interest of $500,000 nor did he tender the unpaid taxes. An alleged Bondholders' Committee, created by the house of issue, sponsored a plan to give the building to the bondholders, subject to the unpaid taxes, and to release the guarantors from their obligation (R. 4, 5). The Trustee of the bond issue was a party to the Plan acting as the depositary thereunder. This Plan was filed on March 31, 1938, in the 77B proceedings.

On May 25, 1938, the alleged class action was commenced by the Security National Bank, a bondholder, seeking in its original complaint *the enforcement of the guarantee* and to restrain the execution of the release by the Trustee (R. 6). The class representative *about-faced* and amended the action wherein it sought *the authorization of the court for the execution of the release of the guarantee* (R. 7-9). The parties to the class action were the persons who sponsored the release. Petitioner Slocum, *who obtained a judgment* on the guarantee, *was not let in as a party* (R. 31). The other petitioners who objected to the release in the Federal Court were also not made parties. At the date when the Superior Court heard only emergency matters

the parties to that alleged class action presented their agreed decree to the court which released the guarantee and procured the entry of the decree on August 9, 1938 (R. 14-19).

In approving the Reorganization Plan in the 77B proceedings the court specifically provided that the release of the guarantee shall not effect those who will not consent thereto (R. 53). The Committee was instructed to consent merely on behalf of those who favored the release but *not on behalf of those who opposed it.* The decree releasing the guarantee *was pleaded in satisfaction of the judgment obtained by petitioner Slocum on the guarantee* (R. 19).

Petitioners filed their complaint on September 7, 1938, which was amended on February 1, 1939. Among other things it was alleged (R. 20-37) that the decree was procured without jurisdiction in that the petitioners whose interest was adverse to that of the alleged representatives of the class were excluded as parties. It was also alleged that the decree was procured by fraud and collusion between the parties to the proceedings in that the alleged representative of the class about-faced for a consideration (R. 29-30). It also charged malfeasance and misfeasance against the Trustee and the Committee. To this complaint the respondents interposed defenses of *res adjudicata* by virtue of the said decree and also by virtue of the 77B proceedings. These defenses were made under the Civil Practice Act of Illinois by a motion to dismiss under Section 48 (R. 41). The trial court sustained these defenses and dismissed the action on April 10, 1939 (R. 57). Its order was affirmed by the Appellate Court on May 20, 1940 (R. 59) and leave to appeal was denied by the Supreme Court of Illinois on October 16, 1940.

Points Intended to be Urged for Reversal.

1. The interest of the petitioners was adverse to the interest of the alleged representatives of the class action, and the court erred in sustaining the defense of *res adjudicata* based on the void decree to which petitioners were not parties and thereby deprived petitioners of due process of law guaranteed by the Fifth and Fourteenth Amendments to the Federal Constitution.

2. The District Court was without jurisdiction in the 77B proceedings to release the guarantors from their liability and to pass on the liability of the Mortgage Trustee for malfeasance and misfeasance, and the court erred in sustaining the defenses of *res adjudicata* based on the foregoing alleged adjudications.

3. The cause of action against the Committee and the Trustee for malfeasance and misfeasance was not the subject matter in the 77B proceedings, and there was never any adjudication by that court on that issue, and the court erred in sustaining the defense of *res adjudicata* based on the 77B proceeding.

4. Orders and decrees obtained by fraud and collusion or without jurisdiction are subject to collateral attack and may not be pleaded in bar to an action by a stranger to the proceedings, and the court erred in sustaining such a decree in bar to petitioners' action and thereby deprived the petitioners of due process of law.

ARGUMENT.

I.

Petitioners were deprived of due process of law guaranteed by the Fourteenth Amendment by the court which sustained the defense of res adjudicata, based on the decree in the alleged class action, to which petitioners were indispensable parties and were deliberately omitted as parties and not fairly represented.

This court had occasion to reverse the Supreme Court of Illinois which held that a class action was binding on the absent members of the class although they were not fairly represented (*Hansberry* v. *Lee,* decided November 12, 1940, 85 L. ed. p. 11). There this court said:

> "The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable. Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts is unknown or where if all were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a decree. In such cases where the interests of those not joined *are of the same class* as the interests of those who are, and where it is considered that the former *fairly represent the latter* in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree."

In deciding that the alleged class action was improperly pleaded in bar and that thereby the parties were deprived of due process this court said (p. 16):

> "It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an asserted obligation. *Smith* v. *Swormstedt,* 16 How. (U. S.) 288, 14 L. ed. 942, *supra; Supreme Tribe, B. H.* v. *Cauble,* 255 U. S. 356, 65 L. ed. 673, 41 S. Ct. 338, *supra; Groves* v. *Farmers State Bank,* 368 Ill. 35, 12 N. E. (2d) 618. It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. *Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.* The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far. See *Terry* v. *Bank of Cape Fear* (C. C.) 20 F. 777, 781; *Weidenfeld* v. *Northern P. R. Co.* (C. C. A. 8th) 129 F. 305, 310; *McQuillen* v. *National Cash Register Co.* (D. C.) 22 F. Supp. 867, 873, affirmed in 112 F. (2d) 877, 882; *Brenner* v. *Title Guarantee & T. Co.,* 276 N. Y. 230, 11 N. E. (2d) 890, 114 A. L. R. 1010; *cf. Wabash R. Co.* v. *Adelbert College,* 208 U S. 38, 52 L. ed. 379, 28 S. Ct. 182; *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 59 L. ed. 1027, 35 S. Ct. 625. Apart from the opportunities it would afford for the *fraudulent and collusive sacrifice of the rights of absent parties,* we think that the representation in this case no more satisfies the requirements of due process than a trial by a judicial officer who is in such situation that he may have an interest in the outcome of the litigation in conflict

with that of the litigants. *Tumey* v. *Ohio*, 273 U. S. 510, 71 L. ed. 749, 47 S. Ct. 437, 50 A. L. R. 1243." (Italics ours.)

The doctrine announced by this court well applies to the instant case.

The judgments in the instant case upon which the pleas of *res adjudicata* was founded are void "upon principles of natural justice, and under the due process clause of the Fourteenth Amendment." (*Simon* v. *Southern Railway*, 236 U. S. 115, 122.)

(a) There was no common interest between the members of the class and the judgment creditor Slocum.

The original suit of the Security National Bank asked for relief for the benefit of the whole class to *enforce the guaranty.* It alleged (R. 6) that *one creditor obtained a judgment* (without naming the creditor) and that there was danger that other judgments would be entered. It asked, among the relief, to restrain further suits and to restrain action on the judgments already procured. *The rights of Slocum, the judgment creditor, were sought to be affected by that suit.* She was known to the plaintiff, and in order to bind her *it was necessary to join her as a party.* When the plaintiff *about-faced,* and instead of seeking the relief for the benefit of the whole class *sought relief against Slocum to restrain her from enforcing the guaranty, she was an indispensible party.* The suit without such judgment creditor as a party was certainly *without jurisdiction.* The original class suit was commenced to enforce the guaranty for the benefit of the class and the *restraining order was sought against the committee,* against the guarantors and against the successor trustee *from carrying out a scheme to release the guaranty* (R. 6-7). In the amended suit the plaintiff sought *to restrain the*

judgment creditor, to restrain all other bondholders from enforcing the guaranty, aiding the committee and the successor trustee to carry out their plan (R. 10). The Security National Bank, a mere bondholder, *which sought to cancel the guaranty,* was not the representative of Slocum whose rights were adjudicated by a judgment in her favor predicated *on the validity of the guaranty.* Slocum, whose interest was *adverse* to that of the plaintiff in the relief sought by the amended suit was therefore an *indispensable party,* and it was the duty of the plaintiff to join her as a party. Even the Supreme Court of Illinois held in its most recent opinion (*Langson* v. *Goldberg,* 373 Ill. 297) that the right of "a member of a class" to represent the class depended on a "common" interest and common "result sought." *Here the interest was adverse.*

In holding adversely to our contention the opinion says (p. 7):

> "It appears that both Hart and Slocum knew of the pendency of these proceedings; neither, however, made any attempt to vacate the decree or appeal from it."

The record shows that Slocum asked leave to intervene prior to the entry of the decree (R. 38). The court denied the request on July 27, 1938 (R. 31), and while she was preparing an amended petition the parties entered the decree on August 9, 1938. She filed her complaint assailing the decree on September 7, 1938 (R. 1). The statement of the court that Hart never sought to vacate the decree *is contradicted by the record* (R. 38). The statement of the court that "Hart, as a depositing bondholder, was represented by the Committee" overlooked that Hart *had objected to the release* in the 77B proceedings (R. 47) and that the order of the Federal Court *expressly forbade the Committee to represent the*

objectors (R. 50). The Committee stated that its actions will not bind those who objected to the release and the Committee was only authorized to act for those who consented to the release (R. 51).

(b) The interest of the dissenters was adverse, and they were known to the parties who fraudulently concealed the proceedings from them.

The decree was similarly *void as to the other bondholders* for the reason that the plaintiff who sought to release the guaranty was not the representative of the bondholders who dissented to the action of the committee and who desired to enforce the guaranty. *They were indispensable parties.* The plaintiff in that suit knew that there were dissenters to the scheme of the committee to release the guaranty, and it *knew* their names and the names of their attorneys. Plaintiff was represented in the 77B proceeding in the hearing before the Federal Master (R. 47). The Security National Bank, the alleged class representative, *knew* that M. A. Rothstein and Irving S. Berman, as attorneys, represented the plaintiff Hart, an objector (R. 47); that the Solvene National Benefit Society was an *objector.* It *knew* the nature of the objections as outlined by the Master (R. 50); that the committee sponsored the scheme and that it held out to the Master that "nothing done here will bind the dissenters." These *dissenters* were depositors (R. 45) whose names were *known,* exclusive of the non-depositors owning bonds in the amount of $130,000 who were *not represented by the Committee.* With the knowledge of these facts, and faced with the express order of the Federal Court that nothing done there should affect the dissenters, *it became the duty of the Security National Bank to make the dissenters parties* or at least to select a group of

n to represent those dissenters. In adjudicating r rights without making them parties *the court d without jurisdiction of the persons of this class, the decree is a nullity as to them.* (*Sheaff* v. *Spind-* 339 Ill. 540; *Chicago Title & Trust Co.* v. *Darley,* 363 197.) The petitioners were deprived of due process *nsberry* v. *Lee,* 85 L. ed. p. 11).

The rights of Slocum as a judgment creditor were affected by the decree to which she was not a party.

s a result of this decree to which Slocum, a judg- nt creditor, was not a party, *she was prevented from enforcement of a judgment after she had gone ough the laborious task of an appeal to the Appellate rt.* This decree to which she was not permitted to be arty was urged in support of a motion in the court ere the judgment was procured to "satisfy the judg- nt," *not by payment,* but by the effect of the decree ich *restrained the enforcement* (R. 19). The execu- n on this judgment was issued August 4, 1938, after disposition of the appeal. The final decree was en- ed within five days, on August 9, 1938. It was en- ed *with great speed* as a levy was threatened, and successor trustee did not await the expiration of rty days for the purpose of an appeal, but *on the t day,* on August 10, 1938, released the guaranty 19). Immediately thereafter a motion was presented the Municipal Court to "satisfy the judgment," *not payment, but by the decree which released the guar- y.* The basis for the satisfaction was (R. 19) "that judgment creditor sought to intervene in that pro- ding on July 27, 1938, and his petition was denied," l the guarantee was released by the decree.

When the plaintiff in the alleged class suit had de- ed to "about face," and instead of seeking relief to

prevent the fraudulent release, to join hands *to aid its accomplishment,* and when it was promised a consideration for such aid, *it ceased to be the representative of the class.* The action was no longer a representative action. The decree which affected the interest of the plaintiffs who were indispensable parties was therefore a *nullity* and could not be pleaded in bar to this action. (*Langson* v. *Goldberg,* 373 Ill. 297.) The decision which held that she had no right to file an independent suit and that her remedy was by a petition to vacate or appeal is in conflict with the decision of this Court in *Simon* v. *Southern Railway,* 236 U. S. 115, 123, holding that one who is not made a party "was not obliged to attack a void judgment in the court that rendered it" but may institute "a new and independent proceeding."

II.

The District Court was without jurisdiction in the 77B proceeding to release the liability of the guarantors as well as the liability of the Trustee and the Committee for malfeasance and misfeasance and the court erred in sustaining the defense of res adjudicata based on the order in the 77B proceeding and thereby petitioners were deprived of due process of law.

In sustaining the defense of *res adjudicata* by reason of the 77B proceeding the opinion states (R. 5):

> "Plaintiffs attack the sale by the trustee of the Harris Brothers stock pledged under the trust deed to the bondholders' committee for $2500; this stock was sold at public auction and the proceeds applied on account of or held for outstanding bonds. The amended complaint contains no allegations as to the actual value of the stock or that the sale price was less than the value or that the trustee was without power to sell. Moreover, this sale was fully described in the Federal court reorganization pro-

ceedings and after evidence before a master and hearing by the court the sale was confirmed. All questions with reference to the action of the trustee in connection with the Harris Brothers Company stock were finally determined in the Federal court, and its conclusion is a bar to the plaintiffs' claim in this respect."

The court overlooked that *the complaint did not seek to set aside the sale* but to hold the Trustee and the Committee *liable for malfeasance and misfeasance in failing to protect the interest of the bondholders under* their trust duties. The complaint called attention to the specific provisions of the Trust Indenture which provided (R. 3):

> "The trustee is hereby expressly empowered *as a trustee of an express trust,* for and on behalf of all and every of the holders of the bonds hereby secured, to demand and enforce said guaranty and recover upon the same * * * and to make, commence, prosecute * * * all and every such claims * * * actions, suits, and/or proceedings at law or in equity as by the trustee may be deemed appropriate."

Article III of the Trust Deed provided (R. 2) that prior to default the Trustee might deliver proxies to the company to vote the stock *"but this shall be terminated in the event of a default at the election of the Trustee."* Article IV of the Trust Deed called for monthly deposits with the Trustee at the rate of $13,750 per month to be used as a *sinking fund* out of which the Trustee was to set apart the semi-annual interest. The default in the non-payment of taxes was made in 1928 and continued up to the date of the filing of the complaint. There was due for the years 1928 to 1936, $173,905.37, exclusive of penalties (R. 4), and at the date of the reorganization the total aggregate taxes which were ahead of the bond issue amounted to $267,979.06 (R.

47). *The Trustee permitted the default in the monthly deposits and in the interest, aggregating $500,000.* The Trustee did not enter into possession to safeguard the income, and *never foreclosed.* The Trustee *did not take any action on the preferred stock,* with the result *that the preferred stock which had a par value of $845,000 shrank to $2,500.* It stood by and permitted the sale of the assets of the Harris Brothers Company in the year 1936 and to exchange the preferred stock for other stock. Even under the exchange rate in 1936 the new stock was worth $3.00 per share (R. 51) and on *that basis* the shares were then worth about $200,000. As a result of its gross negligence it later produced $2,500! The action was therefore not to set aside the sale but to hold the Trustee liable for its gross neglect (R. 32).

The Committee, in order to prevent action by the bondholders accumulated more than 75 per cent in bonds in its possession and thereby the other bondholders were helpless as under the terms of the Trust Deed no action could be taken by less than 25 per cent (R. 24, 25-26). When a demand was made upon the Trustee to take action the Committee opposed it (R. 26). *The Trustee had no right to stand by and permit the defaults and to refuse to take action on the guaranty because a large majority of bondholders were,* through some device of the Committee, *opposed to such action,* particularly when the Trustee knew of the deal between the Committee and the guarantors to release them from the guaranty. (*Chicago Title & Trust Co.* v. *Chief Wash Co.,* 368 Ill. 146.) The successor trustee was a party to the actions of the Committee as it was *the depositary under the deposit agreement of the Committee.* Its failure to exercise a reasonable discretion, particularly when a demand was made upon it to take such action which caused great loss to the bondholders, constitutes misconduct.

The Appellate Court, in disposing of the action against the Trustee said (p. 8):

> "It is true the trustee permitted defaults in the payment of taxes, but there is no allegation that the trustee could have avoided these faults or had any money to make such payments. There is no allegation that any more could have been realized for the bondholders if the trustee had instituted foreclosure proceedings. The committee, representing 90 per cent of the outstanding bonds, was of the opinion that acceleration and foreclosure were inadvisable. The complaint does not suggest that any greater benefits for the bondholders could have been had than was obtained by them in the reorganization accomplished in the Federal Court."

The complaint alleged (R. 32) that if the Trustee had taken action it would have "collected large funds" from the guarantors who were then "possessed of large funds." The complaint also suggests greater benefit (R. 32-33) if the proper protection was given. All that the bondholders received under the Plan was the real estate which was encumbered with taxes and penalties in excess of $250,000 (R. 4) and subject to the reorganization expenses. The premises could not even earn a sufficient amount to pay the taxes.

III.

The cause of action for malfeasance and misfeasance against the Mortgage Trustee and the Committee was not adjudicated in the 77B proceedings nor was it adjudicated in any of the proceedings, and the court erred in sustaining the defenses of res adjudicata.

The court entirely overlooked that the cause of action for malfeasance and misfeasance of the Mortgage Trustee and of the Committee was not adjudicated in *any* of the proceedings.

(a) The claim against the Trustee was not dischargeable in bankruptcy, and the defense of res adjudicata was improperly sustained.

The claim against the First National Bank which assumed its duties as successor trustee *after default* was not a bankruptcy asset. The claim against the bank was that as Trustee of an "express trust" it was required by law to perform *active* duties and to protect the estate. It allowed the mortgagor to suffer the non-payment of taxes (R. 25) for the years from 1928 to 1936, inclusive, aggregating $173,000 increased up to the date of the reorganization to $267,000. (*People ex rel. Barrett* v. *Central Republic Co.*, 300 Ill. App. 297.) It failed to enforce the guaranty during the time that the guarantors were *solvent,* and failed to vote the preferred stock which was valued in excess of $845,000 and whose valuation shrank to $2,500. The 77B proceedings in no way dealt with that claim, and *the bondholders were not parties to that proceeding for such purpose.* They were parties *for two limited purposes* only: (1) on the reorganization plan, and (2) on the appointment of a trustee. (*Milwaukee-Sawyer Building Corporation,* 79 F. (2) 478; *Trust No. 3988,* 85 F. (2) 942; *Kenmore-Granville Hotel Co.,* 92 F. (2) 778.) The proceedings in 77B were improperly pleaded as *res adjudicata* to the claim against the successor trustee.

(b) The release of the guaranty was not adjudicated in the 77B proceeding, and the court improperly sustained the defense of res adjudicata.

The decree of the Superior Court authorized the Trustee to release the guaranty. This decree was attacked as fraudulent and void. The Trustee interposed the de-

fense of *res adjudicata* by virtue of the 77B proceedings (R. 54). The court sustained such defense. The record conclusively shows that *the Bankruptcy Court did not adjudicate this question in the 77B proceedings but left this matter for determination to the Superior Court of Cook County.* The Federal Master stated in his report (Abst. 50):

> "In this proceeding the Committee is merely asking the approval of the Court for the Committee to consent in the State Court on behalf only of those bondholders who have consented to the plan. The Committee states that nothing done here will bind the dissenters—*that being a matter for the State Court.*"

The Trustee *was not authorized* by the order in the 77B proceedings to release the guaranty. No authority was given to anyone to release the guaranty against those who objected. Hart was an *objector* in the 77B proceeding (Abst. 47). The plaintiff Cohn was a *non-depositor.* Slocum was a judgment creditor. There was no adjudication against them in the 77B proceeding and the defense was erroneously sustained.

IV.

A judgment or decree obtained by fraud and collusion or without jurisdiction is subject to collateral attack and the sustaining of the defenses of res adjudicata based on such a judgment deprived the petitioners of due process of law.

One of the defenses to the action was *that the decree which was assailed for fraud by the complaint was res adjudicata* (R. 54, (2) and (3)). This contention was sustained by the Chancellor who sustained "each and every motion to strike." (R. 57.) Petitioners urged that a decree impeached for fraud may not be pleaded in bar

to the action which assailed it. The Appellate Court held that the decree which was not appealed was properly pleaded in bar. On the record as presented for review *the allegations of the complaint which were confessed to be true were to be considered, and not the facts as they appeared in the fraudulent decree.* (*Railway Express Agency* v. *Jones,* 7 Cir. 106 F. (2d) 341.) Its statement (p. 7) that the Sheboygan Bank's Amended Complaint (where it changed its position) was because of "an investigation of the financial condition of the guarantors" *is based on its allegations and not on petitioners' allegations which assailed the truth thereof.* The matter was disposed of on the motion to dismiss, *which admitted the facts charged in the complaint* that the bank, the alleged class representatives, which filed its first complaint to *restrain the cancellation of the guaranty* and to prevent the acceptance of the $143,200 in bonds (acquired at 10 cents on the dollar) had "about-faced" (R. 7) and filed its Amended Complaint *asking the cancellation of the guaranty and the acceptance of the tender* (R. 30). *The complaint charged that it "about-faced" because of a secret deal,* based on a promise to pay its counsel $1,000, as well as other considerations to the plaintiff (R. 30). It charged that the secret deal was carried out by the entry of the decree (not upon evidence, not upon a reference, and Master's Report, as the Appellate Court says) as an "emergency matter," without *notice to Slocum,* who was then a judgment creditor whose right was sought to be affected. These allegations cannot be overcome by the statement of the court that "mere conclusions as to fraud are not sufficient" as the allegations were ultimate statements of fact.

(a) A decree which is sought to be impeached for fraud cannot be pleaded in bar to the bill of impeachment.

It is elementary that a decree may be impeached for fraud, and *such a decree may not be pleaded in bar to the action.* (*Green* v. *Hutsonville School District,* 356 Ill. 216; *Bernero* v. *Bernero,* 363 Ill. 329.)

(b) The decree was procured by fraud and collusion, and it was the duty of the Appellate Court to reverse the order of dismissal.

On a motion to dismiss the question is presented whether the complaint as a whole states any cause of action, and if it does, no such motion can be sustained. (*Barzowski* v. *Highland Park State Bank,* 371 Ill. 412, 416; *Messick* v. *Mohr,* 292 Ill. App. 69.) The statement (p. 7) that "no facts are shown supporting the charge of fraud and collusion," is refuted by the allegations of the complaint. Paragraph 9 of the complaint charged (R. 29) that after filing the complaint as a class suit for the alleged benefit of the class to prevent the release of the guarantors, the alleged representative of the class, "entered into secret arrangements with the defendants *to obtain the approval* of "the release of the guarantors," and "as part of this scheme it was agreed that the plaintiff would about-face" and file the Amended Complaint seeking therein the cancellation of the guaranty instead of the relief to restrain the cancellation thereof; as an inducement to such class representative to obtain such results it was promised $1,000 for its counsel and other considerations; that the foregoing scheme was carried out (R. 30). The details how it was carried out were stated.

In sustaining the defense that the decree was a bar

to the complaint the court overlooked the rule in *Comstock-Castle Co.* v. *Baldwin,* 169 Ill. 636. There it was said:

> "Courts of equity will not be prevented from protecting the equitable rights of parties by the mere **garb or form in which persons devising fraudulent schemes to obtain the property of others without recompense have clothed their illegal transactions.** The practice of taking advantage of the forms of law and of proceedings of courts of justice to perpetrate such frauds, by organizing fraudulent corporations and by obtaining fraudulent judgments, is by no means uncommon. **To permit laws enacted for the public good to be so perverted and courts of justice to be used and imposed upon, and then to say that there is no remedy because what was done was done under the forms of law,** would be to make the law and the courts themselves the **instrument of dishonest schemers."** (Bold type ours.)

This rule was reiterated by this court in *Pepper* v. *Litton,* 308 U. S. 295.

(1) The decree releasing the guaranty was a result of fraud.

Slocum had a judgment in her favor on the guaranty which was affirmed by the Appellate Court. *The proposition that a guarantor may after default procure a release of the guaranty by the reduction of the bond issue and thereby affect the existing default is such an absurdity that if called to the attention of the Chancellor he would never have stamped the consent decree with his approval.* By their guaranty they agreed to pay *"and and every coupon for interest upon any of said bonds."* (R. 23.) At the date of the entry of the decree *there was a default in interest coupons from January 1, 1932, to July 1, 1938, on the principal amount of $1,143,000.* Here was a clear liability which was due from the

guarantors who were liable thereon without notice or demand (R. 23). The clause (R. 8) that upon the reduction of the bond issue from one and one-half million dollars to one million dollars the guaranty should cease *could not have affected the then existing liability in excess of $500,000 for the default in interest which accrued prior to the reduction.* The entry of the decree *without notice to Slocum* or to any other parties who they knew to be *opposed* to the release *was a fraud upon the court.*

(2) There was no ambiguity in the terms of the trust indenture pertaining to the liability on the guaranty, and the guaranty, and the jurisdiction for the construction of the terms of the trust deed was merely colorable.

A court of equity has jurisdiction to construe a trust when an ambiguity exists and is without jurisdiction to construe a trust when there is nothing to construe. (*Chicago Title & Trust Co.* v. *Robin,* 361 Ill. 261; *Hoefeld* v. *Sixty-third Halsted Realty Co.,* 289 Ill. App. 305.)

In answer to this point the Appellate Court said:

> "Examination of the trust deed (Sec. 13, Art. 5) shows the trustee was authorized to accept and receive in satisfaction of the mortgage debt 'such amount and amounts of money as the trustee in its unlimited discretion may deem advisable.' We find no language specifically authorizing the trustee to accept bonds in compromise of the guaranty. A certain amount of discretion was lodged in the trustee by the terms of the trust deed, but there is no allegation that this discretion was not exercised honestly and fairly."

The fallacy is apparent. *The Trustee refused to exercise its discretion* (R. 13), but relied on the decree, and it is conceded by the court that there is no such power under the terms of the trust. The court also miscon-

ceived the whole point. This was not a case where a payment was made as a consideration for the cancellation of the guaranty and where the question was whether the consideration was sufficient. Here, the Bond Issue was in default and the principal and interest amounted to $1,500,000. By the device of cancelling $143,200 of the defaulted bonds of the principal issue was reduced to $1,000,000, and *thereby* the guarantors were to be relieved from liability. No such discretion was vested in the Trustee, and there is no *legal* basis for the decree. When this matter was presented to the Federal Master he said (R. 50):

> "The committee's representative stated that it may be contended that since the outstanding bonds have been reduced to $1,000,000.00 the guaranty is discharged; that there may be a *question whether that provision of the trust deed applies to liabilities that have accrued.* * * * In this proceeding the Committee is merely asking the approval of the court for the committee to consent in the state court on behalf only of those bondholders who have consented to the plan. The Committee states that *nothing done here will bind the dissenters—that being a matter for the state court.*"

They *did bind the dissenters by the fraudulent decree.*

(3) The release was not the result of a judicial determination in the 77B proceedings.

Neither the Federal Master nor the court in the 77B proceeding *ever passed on the propriety of the release.* The Master merely recommended that the Committee be authorized to consent on behalf of the depositors who did not dissent. The Committee represented to that court *"that nothing done here will bind the dissenters"* and left all matters to the "state court." When action was taken in the Superior Court to "bind the dissenters"

the Committee, the plaintiff, and the Trustee, who had previously agreed on the deal to release the guarantors, should have at least given notice to those who would be affected thereby.

(c) The decree is void for want of jurisdiction and was improperly allowed to be pleaded in bar to the action which sought its avoidance.

It is elementary that *if a court is without jurisdiction of the subject matter or the parties the decree is a nullity and may not be pleaded in bar.* (*People* v. *Miller,* 339 Ill. 573, 588; *Green* v. *Hutsonville School District,* 356 Ill. 216.) We have shown that the court was without jurisdiction of the persons of the petitioners. The sustaining of the defense of *res adjudicata* by virtue of the decree deprived the petitioners of their property without due process of law. (*Scott* v. *McNeal,* 154 U. S. 34; *Simon* v. *Southern Railway,* 236 U. S. 115; *Hansberry* v. *Lee,* 85 L. ed. p. 11.)

V.

The decision that third parties may not file an independent suit to impeach a decree for fraud or to escape the consequences of a void decree and that their remedy is only by appeal or error is contrary to fundamental law and to the decisions of this court.

The opinion pointed out (p. 7) that no appeal or error was sued out and that the decree was not open to collateral attack by the complaint "in the nature of a Bill of Review." It completely overlooked that this was a suit by *third parties* to impeach a decree for fraud which was extrinsic to the record and an independent suit is properly maintainable to attack such a decree. (*Hohrod* v. *State,* 237 Ill. 229; *Bergman* v. *Rhode,* 334

Ill. 143; *Green* v. *Hutsonville School District,* 356 Ill. 216; *Chicago Title & Trust Co.* v. *Darly,* 363 Ill. 197.) In *Bernero* v. *Bernero,* 363 Ill. 328, the court held that a *"third person" may impeach a fraudulent decree by an independent suit.* This court held in *Hansberry* v. *Lee,* 85 L. ed. p. 11 that *a decree for want of jurisdiction is subject to collateral attack.* The decision in the instant case cannot be reconciled with the fundamental law as announced by this court. (*Johnson* v. *Waters,* 111 U. S. 64.)

The Appellate Court completely overlooked the distinction between (1) an independent suit by a third party to impeach a decree for fraud or to avoid the consequences of a void decree, and (2) a bill of review. The *former may even be filed during the pendency of an appeal,* and the only mode to impeach a decree for fraud extrinsic to the record is by an independent suit. In *Dowagiac Mfg. Co.* v. *M'Sherry Mfg. Co.,* 155 F. 524 (C. C. A. 6), the Court said (p. 528).

> "The *radical difference between these two kinds of bills* is that a bill of review is a continuation of the original litigation, whereas *a bill impeaching a decree for fraud is not.* It is new and independent litigation. The rules applicable to the two kinds of bills are different. As, for instance, it is well settled, in certain jurisdictions at least, that a bill of review cannot be filed after a decree has been affirmed on appeal, at least where the ground thereof is newly discovered evidence, unless the right to file it has been reserved in the decree of the appellate court, or permission be given on application to that court directly for that purpose. *Southard* v. *Russell,* 16 How. 545, 14 L. Ed. 1052; 2 Bates on Fed. Eq. Proc. Sec. 717. *But such is not the case as to a bill to impeach a decree for fraud.* It can be filed without such leave being first had. 2 Daniell's Ch. Pl. & Pr. (5th Ed.) 1584; 2 Beach, Mod. Eq. Pr. Sec. 884; *Ritchie* v. *Burke* (C. C.) 109 Fed. 16, 18."

e court further said:

"But *a bill impeaching a decree for fraud need not, in so far as it seeks relief, concern itself with the decree.* It may be limited to seeking an injunction against its enforcement or *to depriving the party in whose favor it has been rendered of the benefit which he has derived from it.* Indeed, it may be that such is all that such a bill is ever properly concerned with. If such a bill is so limited, the above reasoning cannot be applied to prevent its being filed pending on appeal from the decree. The two proceedings are not in such a case seeking the same relief. *The appeal is seeking to have the decree vacated and set aside, whereas the bill is seeking to prevent its enforcement* or to obtain a restoration of the benefits derived under it. It is on the ground that such a bill may be so limited, or such is its proper nature, that it has been held that a Circuit Court of the United States can give relief against a decree of a state court obtained by fraud. It was so held in the cases of *Gaines* v. *Fuentes,* 92 U. S. 10, 23 L. Ed. 524, and *Marshall* v. *Holmes,* 141 U. S. 597, 12 Sup. Ct. 62, 35 L. Ed. 870, where the bills sought an injunction against an enforcement of the decrees, and also in the cases of *Johnson* v. *Waters,* 111 U. S. 667, 4 Sup. Ct. 619, 28 L. Ed. 547, and *Arrowsmith* v. *Gleason,* 129 U. S. 99, 9 Sup. Ct. 237, 32 L. Ed, 630, where the bills sought a restoration of benefits derived under them." (Italics ours.)

The decision was cited with approval in *Peeke* v. *izens Banking Co.,* 81 F. (2) 112, 114 (C. C. A. 6) d in *Irvin* v. *Buick Co.,* 88 F. (2) 947, 949 (C. C. A. 8).

The decision that a judgment assailed for want of isdiction of the person may be pleaded in bar to e action is in conflict with the decision of this court *Simon* v. *Southern Railway,* 236 U. S. 115, 123 and th the "principles of Natural Justice."

It is evident from the foregoing that the decision in

the instant case is *basically unsound* and in *conflict* with "principles of natural justice" and with "due process of law."

For the foregoing reasons we urge the issuance of the Writ.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 62 0

LAURA S. K. SLOCUM, A. COHN and MERWIN M. HART,

Petitioners,

vs.

FIRST NATIONAL BANK OF CHICAGO, JOHN C. MEINERS and JOHN C. PARTRIDGE, individually and as members of a Bondholders' Protective Committee under a Deposit Agreement dated December 31, 1931, A. HARRIS, M. ROTHSCHILD, H. H. BAUM, SECURITY NATIONAL BANK OF SHEBOYGAN, WISCONSIN, as Trustee under the Last Will and Testament of Joachim Johann, and A. C. ALLYN & CO., a Delaware Corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

PETITIONERS' REPLY BRIEF

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Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 620

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vs.

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ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

PETITIONERS' REPLY BRIEF

The "Statement" Is Inaccurate.

The statement that the "original proceedings" commenced by the "Security" Bank was a "class" suit is incorrect. In its *first* count (R. 5-6) it sought relief for *its own benefit to obtain a judgment of $12,723.75.* In

its "second" count it became a "class" representative and alleged that a "judgment has already been taken" and that "other suits are being threatened." The judgment creditor Slocum was not made a party and *was not let in as a party* (R. 66).

The "about face" of the representative of the "class suit" from a suit to *restrain the release* (R. 6-7) to a suit *to authorize the release* is said to be (p. 3) because of its "thorough examination" and as a "result of such examination." It is true that it made such explanation in its amended complaint for its "about face" but its allegations are not binding on the petitioners who challenged the truth thereof and who alleged that the "about face" was the result (R. 33) of a "secret deal" and because (R. 30) of the promise of a fee of $1,000 to its counsel and "other consideration." *These allegations stand admitted by the motion to dismiss* and the allegations of the "Security" Bank to which they refer (p. 3) *cannot be considered.*

The same "class" representative which alleged in the "original proceedings" that the Trustee failed to take action to "enforce the guarantee" (R. 6) and was (R. 7) then "informed" of the "facts" and *sought to restrain the cancellation of the guarantee* is the same "person" which later stated in the amended complaint that the advantages and benefits "of the proposed tender" (R. 7) will be lost unless the tender was accepted! It was the same tender which it assailed in the original proceeding (R. 7) and against which it sought "equitable" relief.

The First National Bank, as Trustee, which filed the answer in the class action asking for the construction of its "power" as quoted in their brief (p. 4) had previously become a party to the plan (R. 4) which provided for the cancellation of the guarantee, and acted as depositary thereunder (R. 37).

The "Contentions" Are Untenable.

Respondents' contentions are (p. 8): (1) all constitutional questions have been waived, and (2) that petitioners were represented in the class action. We will show (1) that no construction of the constitutional question is involved and of course the doctrine of "waiver" is inapplicable to questions which never existed, and (2) that petitioners were not represented by the alleged "class" representative.

THE "ARGUMENT" IS BUILT ON FALSE PREMISES.

I.

The federal question was not waived by the appeal to the Appellate Court.

The contention that this court is without jurisdiction to grant the writ because "all constitutional questions" were "waived" by the appeal to the Appellate Court is founded on the confusion between a *construction* of a "constitutional question" and a "Federal question."

A. An appeal to the Supreme Court of Illinois can only be taken where the validity of a statute or the construction of the Constitution is involved and not from the denial of a right under the Constitution and therefore there was no waiver of the federal question.

The contention that "all constitutional questions" were waived by the appeal to the Appellate Court and not to the Supreme Court, is based on their *failure to distinguish* between a *"construction"* of the Constitution which gave the Supreme Court of Illinois the exclusive jurisdiction on appeal, and a *"right"* under the

Constitution where the appeal can only be taken to the Appellate Court. This distinction was clearly made in *Cooper* v. *Palais Royal Theatre,* 320 Ill. 44. We quote the following:

> "In order to confer jurisdiction on this court to review a case on appeal direct from the circuit court on the ground that a constitutional question is involved, a *construction* of the constitution must be involved or the *validity* of a statute questioned. (Practice act, sec. 118; *People* v. *Cermak,* 317 Ill. 590.)" (Italics ours.)

The same principle is announced in *Economy Dairy Co.* v. *Kerner,* 371 Ill. 263, where the court says:

> "The mere assertion that a constitutional question is involved or that a constitutional right has been invaded is not sufficient, in the absence of other grounds, to confer jurisdiction, (*Hawkins* v. *Hawkins,* 350 Ill. 227,) as no duty rests upon the court to discover a basis on which jurisdiction to entertain the appeal can be sustained. (*City of Chicago* v. *Peterson,* 360 Ill. 177; *People* v. *Davies,* 350 *id.* 48; *Iles* v. *Heidenreich,* 271 *id.* 480; *People* v. *City of Chicago,* 238 *id.* 146.) A constitutional question is not presented, so as to give this court jurisdiction of a direct appeal, where a judgment or decree is assailed on the ground that its enforcement will deprive the person against whom enforcement is sought of some constitutional right. The question in such case is merely the validity of the judgment or decree. *O'Connor* v. *Rathje,* 368 Ill. 83; *De La Cour* v. *De La Cour,* 363 *id.* 545; *Genslinger* v. *New Illinois Athletic Club,* 332 *id.* 316; *Cooper* v. *Palais Royal Theatre Co. supra.*"

The present Illinois Civil Practice Act confers the jurisdiction of a direct appeal to the Supreme Court in cases in which "the *validity* of a Statute or a *construction* of the constitution is involved." (Chapter 110, Section 199 of the Civil Practice Act.) This court has

squarely held *that it has jurisdiction of an appeal taken to the Appellate Court.* This court said in the "St. Paul" case (279 U. S. 410) cited in our brief (p. 7):

> "The judgment is reviewable here. 'Wherever the highest court of a State by any form of decision affirms or denies the validity of a judgment of an inferior court, over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involves a Federal question, will, upon a proper proceeding, attach.' *Williams* v. *Bruffy,* 102 U. S. 248, 255. And see *Gregory* v. *McVeigh,* 23 Wall. 294, 306."

Jurisdiction was also sustained in *C. & O. R. Co.* v. *Mihas,* 280 U. S. 102; *Home Ins. Co.* v *Dick,* 281 U. S. 397. If it be true that an appeal to an Appellate Court waives every Federal question then the jurisdiction sustained in the foregoing cases could not have been sustained.

B. The Federal question was raised and the rule applicable to construction of constitutional questions is applicable here.

The contention (p. 13) that "failure to raise the constitutional question" constitutes "a waiver" is of course based on the same false premises that a *construction* of a *constitutional* question is synonymous with a *"right"* under the constitution. In stating the grounds for the jurisdiction invoked (p. 6) we stated that it was *invoked under "237b."* The cases on which they rely, apply to "237a," involving "validity" or "construction." They are inapplicable to "237b" involving a "right" under the constitution. We cited (p. 7) the *Cumberland* case (237 U. S. 447) on the point that a *defense of res adjudicata* based on a Federal decision *"presents a Federal question"* and *asserts* "a *right"* under Section 237b.

The *"Penn"* case (297 U. S. 447) on which they rely and which they quote (p. 13) deals with the "construc-

tion of the Federal Constitution." The same case held (p. 451) that under 237b the appeal to the Appellate Court conferred jurisdiction here for the issuance of the writ.

II.

The order dismissing the complaint was improper and presents a Federal question.

The contention (p. 15) that the decision in the *Hansberry* case is inapplicable here because the petitioners were represented by the plaintiff in the "original proceedings" is *fallacious*. How a *general* creditor who seeks a personal judgment in its first count (R. 5-6) can become a representative of one who was a judgment creditor is indeed a puzzle. How the same *general* creditor who seeks in its second count to restrain the enforcement of the judgment can become the representative of such judgment creditors is still a greater puzzle, but the argument that such *general* creditor may commence a "class" action to restrain a cancellation of a guaranty and later *about face and seek such cancellation* and thereby affect the rights of the judgment creditor is indeed *ridiculous*. The contention that the Successor Trustee represented the petitioners is equally unsound. The proposition that the Trustee represents the bondholders is applicable in cases where the Trustee *seeks to obtain property for the trust* estate, not where the Trustee *seeks to abandon trust property* or to release the trust estate from any lien. (*Colorado and Southern Railway Co.* v. *Blair,* 214 N. Y. 497; Bogert on Trusts and Trustees, Vol. 3, Section 593.)

In *Speakman* v. *Tatem,* 45 N. J. Eq. 388 (cited in 65 Corpus Juris, 901) the Court said:

> "In all cases where the suit is to take the trust fund out of the hands of the trustees, or where it

is for an account of the trust fund, being in fact a bill for the execution of the trust, *the cestuis que trust must all be parties.* Where the suit is merely to enable the trustees to get possession of the trust fund, the *cestuis que trust* may be omitted but *not where it relates to the execution of the trust."* (Italics ours.)

The decisions that bondholders are not indispensable parties where the Trustee and a committee are parties has no application here for the reason that in all such cases there was an *adversary* party to represent the class. Here, the plaintiff sought the *approval* of the action for the Committee and the Trustee was a party to the Committee's Plan (R. 37) and *every party known to them to oppose their scheme was omitted and not even let in when he sought to protect his rights.*

CONCLUSION.

The main issues in the case were evaded by the respondents. They were in no position to justify the decree which deprived petitioner Slocum of her right to the enforcement of the judgment without making her a party. The defense is purely on technical points without merit. For the foregoing reasons we urge the issuance of the Writ.

Respectfully submitted,

MEYER ABRAMS,
LEO L. GINSBURG,
Counsel for Petitioners.

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CLERK

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 620

LAURA S. K. SLOCUM, A. COHN and MERWIN M. HART,

Petitioners,

vs.

FIRST NATIONAL BANK OF CHICAGO, JOHN C. MEINERS and JOHN C. PARTRIDGE, individually and as members of a Bondholders' Protective Committee under a Deposit Agreement dated December 31, 1931, A. HARRIS, M. ROTHSCHILD, H. H. BAUM, SECURITY NATIONAL BANK OF SHEBOYGAN, WISCONSIN, as Trustee under the Last Will and Testament of Joachim Johann, and A. C. ALLYN & CO., a Delaware Corporation,

Respondents.

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REPLY TO BRIEF OF A. C. ALLYN & COMPANY

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FOREWORD.

After we forwarded to the Clerk of this Court petitioners' reply to the brief of the other respondents we were served with a copy of the brief of A. C. Allyn & Company (hereinafter referred to as "Allyn"), and this reply is limited to the additional points argued there.

I.

Jurisdictional Question.

Allyn states (p. 6) that its motion to dismiss was on several grounds, some of which went *to only parts of the complaint.* Under the Illinois Law the pleader must ask the appropriate relief. The pleader may not move to strike parts of a complaint and ask for the relief to dismiss a whole complaint (*Messick* v. *Mohr,* 292 Ill. App. 69, 77). Allyn did not ask in the prayer for relief to strike parts of the complaint but it asked "to dismiss" the *entire* complaint (R. 57). It did not obtain other relief to strike parts of the complaint but *it obtained relief to dismiss the entire complaint.* It now *confesses* (p. 13) that it was not entitled to a dismissal of the entire complaint on the two pleas of *res adjudicata,* yet it *obtained such relief.* On the one hand Allyn contends that the decision may be sustained on a "non-federal" question, and on the other hand it *concedes* (p. 10) *that the entire complaint could not have been dismissed on the motion to strike only parts of the complaint* and that the pleas of *res adjudicata* "could not constitute sufficient ground for the striking of the entire amended complaint and the dismissal of the entire action." It is petitioners who urged this point below (R. 100, 101). The Appellate Court held that it *"could,"* and *it did sustain the dismissal of the entire complaint.* This is what we seek to review. The Trustee sought the dismissal of the *entire* complaint on the pleas of *res-adjudicata* (R. 34 (1) and (2)), and it *obtained such relief.* The contention that the decision might have been based on a "non-federal" question disregards the decision which *sustained the motion to dismiss on the federal questions,* namely, the pleas of *res adjudicata.* Besides, the non-federal question must be "fair," "substantial"

and *not* "untenable." The alleged non-federal question that the complaint did not comply with Section 33 of the Civil Practice Act *was untenable* because of Rule 12 of the Illinois Supreme Court (*Kovar* v. *Bremer, et al.,* 281 Ill. App. 505, 509). The numerous citations on the point that where there is a "non-federal" question and a "federal" question the court will not take jurisdiction if the decision can be sustained on the non-federal question *hinges on the point whether the non-federal question can sustain the judgment.* The non-federal question must *not* be "unfounded" (*Enterprise Irrigation District* v. *Construction Co.,* 243 U. S. 157, 164). The non-federal question must be "fair" (*Ward* v. *Love County,* 253 U. S. 17, 22). They, *who admit that they were not entitled to a dismissal of the entire complaint* under their pleas of *res adjudicata* and who obtained such relief *cannot be heard to say* that the granting of their motion was on a non-federal question, to prevent a review here.

This court has held that it is its duty to examine the record to see if the non-federal question was "substantial" and "fair" and sufficient to support the judgment. For a discussion of the whole subject we refer to Robertson & Kirkham on Jurisdiction of Supreme Court, page 156, Section 89.

II.

The Cases Are Not Distinguishable.

The attempt (p. 10) to distinguish the *Cumberland* case (237 U. S. 447) on the ground that there the pleas were not sustained and here the pleas were sustained are devoid of merit. The case of *Postal Telephone Cable Co.* v. *Newport,* 247 U. S. 464, 475, presents a case where the plea of *res adjudicata* was *sustained,* and the court held that it *presented a Federal question under 237b.*

There, the point was raised that the decision might be based on a "non-federal" question. The court held that the decision which sustained a plea of *res adjudicata* based on a judgment to which the petitioner was not a party was "too clearly unfounded" to support the decision. The contention (p. 13) that the pleas of *res adjudicata* were raised only to certain causes of the complaint and not to the entire complaint is unsound for the reason that the court did not sustain the motion to strike part of the complaint *but sustained the motion to the entire complaint.*

We are not concerned now with the decision of the trial court but with the decision of the Appellate Court *which sustained these pleas to the entire complaint.* This is what we seek to review here. Besides, the motion of the trustee was to dismiss the entire complaint predicated on the pleas of *res adjudicata* (R. 34 (1) and (2)) and the trial court sustained (R. 57) "each and every motion" and this is what the decision affirmed.

All other points discussed in the Allyn brief are covered by the reply to the brief of the other respondents.

For the foregoing reasons we urge the issuance of the Writ.

Respectfully submitted,

MEYER ABRAMS and
LEO L. GINSBURG,
Attorneys for Petitioners.

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FILED
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CLERK

IN THE

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Respondents.

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BRIEF AND ARGUMENT OF RESPONDENTS M. ROTHSCHILD, THE FIRST NATIONAL BANK OF CHICAGO, AND JOHN C. MEINERS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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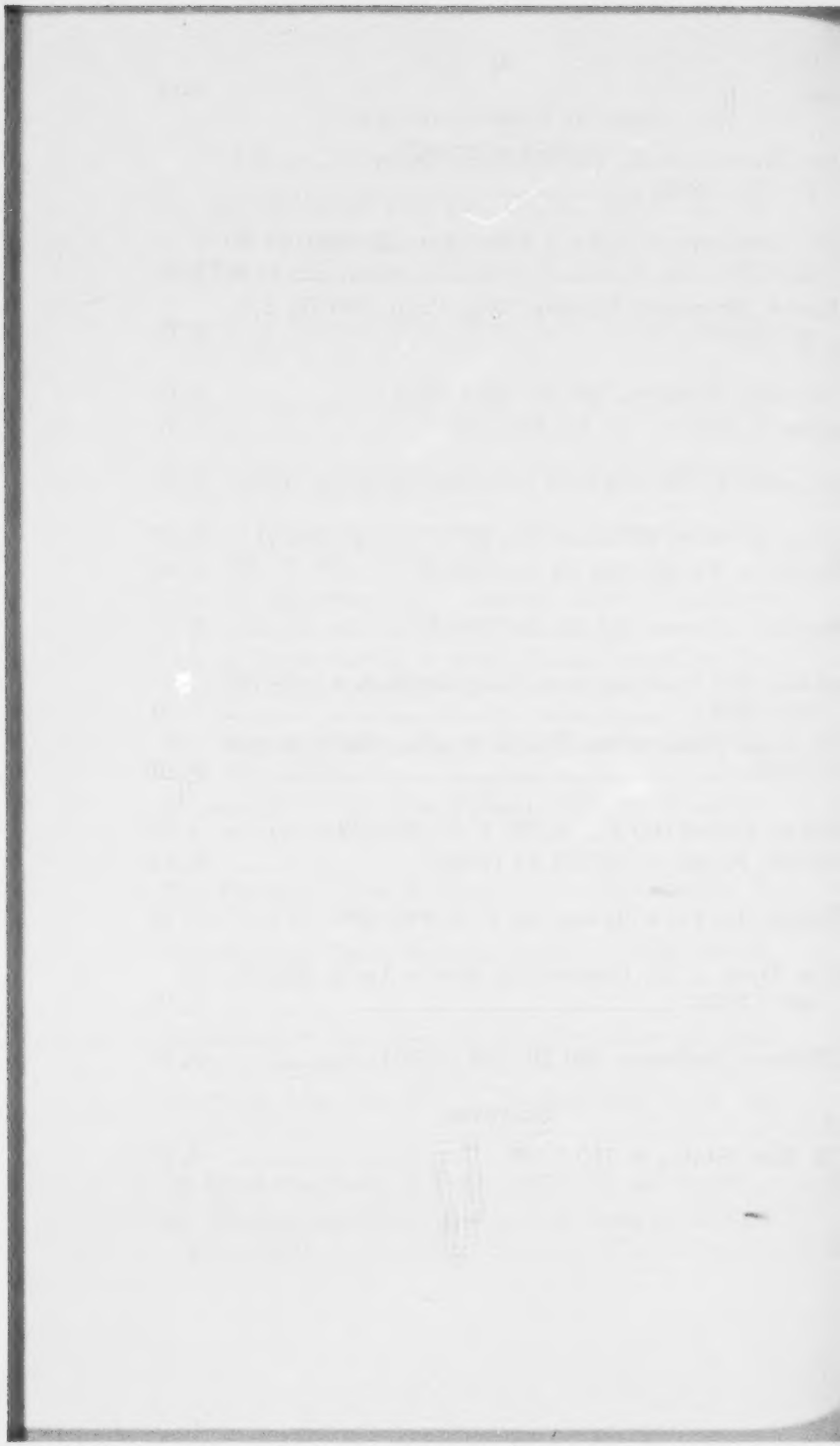

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 620

LAURA S. K. SLOCUM, A. COHN AND MERWIN M. HART, *Petitioners,*

vs.

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ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST DISTRICT.

BRIEF AND ARGUMENT OF RESPONDENTS M. ROTHSCHILD, THE FIRST NATIONAL BANK OF CHICAGO, AND JOHN C. MEINERS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The failure of the petitioners adequately to set forth the underlying facts requires their restatement. The most superficial examination of such facts discloses that all consti-

tutional questions have been twice waived by the petitioners and that, in any event, there is no substantial federal or constitutional question involved.

The Ashland Industries Building Corporation, under date of January 1, 1926, issued its First Mortgage Real Estate 6% Sinking Fund Gold Bonds (hereinafter termed the "Bonds") in the principal amount of $1,500,000. To secure the repayment of the Bonds, the debtor corporation executed its Indenture of Trust, conveying certain real estate therein described, to the Foreman Trust and Savings Bank as Trustee. (The respondent, The First National Bank of Chicago, is the Successor Trustee under the Indenture of Trust.) In addition, five individuals, including the respondent, M. Rothschild, executed, as accommodation sureties, a Guaranty of the indebtedness (R. 63-66). Three of such guarantors are made defendants to this proceeding. The Guaranty expressly provided that "whenever" the aggregate principal amount of Bonds outstanding shall have been decreased to $1,000,000 or less, "then and in such event, all and every of the obligations of the several Guarantors, and each of them, shall be deemed to be fully discharged and satisfied and this present Guaranty shall become wholly inoperative and of no effect" (R. 66).

The Trustee under the Indenture is, by Article 5, Section 13 of the Trust Indenture, expressly given the power "to demand and enforce said Guaranty and recover upon the same, and to accept and receive in satisfaction thereof such amount and amounts of money as the Trustee in its unlimited discretion may deem advisable; and to make, commence, prosecute, compromise and/or compound all and every such claims, demands, actions, suits and/or proceedings at law or in equity as by the Trustee may be deemed appropriate" (R. 64).

On or around January 1, 1932, the debtor corporation defaulted in the payment of its interest and sinking fund

obligations. By that time the aggregate principal amount of the Bonds then issued and outstanding had been reduced to $1,143,200 (R. 6, 8). Thereafter, a petition had been filed in the United States District Court for the Northern District of Illinois, Eastern Division, for the reorganization of the debtor corporation, pursuant to Section 77B of the Federal Bankruptcy Act. In this proceeding two of the petitioners, namely, Slocum and Hart, were represented by counsel (R. 47). A bondholders' committee was organized, of which the respondent, John C. Meiners, is a defendant to this proceeding. Bonds in the aggregate principal amount of $1,015,600 (net after withdrawals) were deposited with the committee (R. 45), being 88.83 % of the Bonds then issued and outstanding. One of the petitioners, Hart, is the holder of Certificates of Deposit (R. 84). The petitioner, Slocum, recovered a judgment against M. Rothschild in the amount of $684.42, representing unpaid interest to that date upon two $1,000 Bonds (R. 84). The Bonds have not matured and the principal amount is not as yet due and payable.

On May 25, 1938, during the pendency of the reorganization proceeding, the Security National Bank of Sheboygan, Wisconsin, as holder of bonds in the aggregate principal amount of $9,000, filed its complaint (hereinafter sometimes termed the "Original Proceeding" or "Security National Bank case"), in a "class" suit naming as defendants the respondents named herein, with the exception of the respondent, A. C. Allyn & Co. This complaint was brought by the Security National Bank in its own behalf and in behalf of all other bondholders (R. 5-7). Thereafter, this complaint was amended by the Security National Bank and as amended it alleged that the Security National Bank had made a thorough examination of the financial affairs of the Guarantors; that as a result of such examination, the plaintiff was of the opinion that the Guarantors were in no position to make any substantial cash payment upon the

Guaranty; that the defendant, M. Rothschild, was the holder, directly or indirectly, of Bonds in the aggregate principal amount of $143,200; that, on information and belief, such Bonds had been tendered for cancellation to The First National Bank of Chicago, as Successor Trustee, together wih a release of Rothschild's right of subrogation, in consideration of the acknowledgment of The First National Bank of Chicago of the termination of the Guaranty, pursuant to its express terms, and the release of M. Rothschild from any further obligations thereunder (R. 7-10). The amended complaint then stated:

> "* * * which said conditional offer of tender was, by said Successor Trustee, by reason of uncertainties as to its powers, duties and obligations under said Indenture and said Guaranty, thereupon refused and rejected. By reason of the foregoing, plaintiff fears that save by the intervention of a court of equity, the advantages and benefits of the aforementioned proposed tender by said M. Rothschild will be lost to the plaintiff and to the other holders and owners of said Bonds similarly situated and represented by it in this proceeding." (R. 9.)

The First National Bank of Chicago, among others, filed its answer to that complaint and prayed:

> "* * * for the construction by the court of the provisions of said Indenture with reference to the rights, powers, duties and authority of the Trustee with reference to said guaranty and the construction of the provisions of said guaranty agreement with reference to the release and discharge of said guarantors upon the surrender and cancellation of the bonds proposed to be tendered herein and further prays for the instructions of the court with regard to the action herein proposed to be taken." (R. 13-14.)

Upon that record a final decree was entered on August 9,

1939, construing the Guaranty and finding it to be terminated by virtue of its express terms and the Guarantors discharged upon the reduction of the principal amount of the Bonds then issued and outstanding to $1,000,000 or less. In addition, the Court held the Successor Trustee to have the express power under the Trust Indenture to compromise and settle the Guaranty. Pursuant to that Final Decree and upon the cancellation of Bonds in the aggregate amount of $143,200 and the relinquishment by the respondent, M. Rothschild, of his right of subrogation, the Successor Trustee executed its release of the Guaranty, (a) under its express power as Successor Trustee to compromise and settle the Guaranty, and (b) by reason of the termination of the Guaranty by its own express limitation (R. 14-19).

The instant proceeding, which the petitioners now seek to have reviewed by this Court, constitutes a direct attack upon that Final Decree by way of a Bill in the nature of a Bill of Review. The purpose of the instant proceeding is to vacate and set aside the Final Decree in the original proceeding entered on August 9, 1939 (R. 37).

On July 27, 1938, thirteen days prior to the entry of the Final Decree, Slocum, one of the petitioners in the instant proceeding, filed her petition to intervene in the Original Proceeding. Her petition was denied by one of the judges of the Superior Court of Cook County upon the ground that it was insufficient, but "without prejudice, however, to further application" (R. 66). No further application was made by the petitioner Slocum either in the thirteen days preceding the entry of such Final Decree or in the thirty days thereafter, during which the trial court retained jurisdiction.

The petitioner Hart sought to intervene in the Original Proceeding subsequent to the entry of the Final Decree for the purpose of vacating it and setting it aside. The leave

to intervene was granted, but the relief sought was denied (R. 53-54; 56). After full hearing and argument, the Court found that the trial court had had jurisdiction both of the parties and of the subject matter and that the petitioner Hart had been represented in the Original Proceeding as a matter of law (R. 53-54; 56). No appeal from that order was ever taken.

After the filing of the amended complaint in the Original Proceeding by the Security National Bank, the Bondholders' Committee, representing 88.83% of all the outstanding Bonds, filed its petition in the Federal District Court, seeking leave to enter its appearance in the State Court proceeding, and to join in the relief prayed in the amended complaint. The matter was thereupon referred to Special Federal Master Grossman. An extended hearing was had at which two of the petitioners herein, Slocum and Hart, were represented by counsel (R. 47). The Special Master filed his report, recommending that the Committee be authorized to consent, in the State Court proceeding, to the relief prayed in the Amended Complaint of the Security National Bank. The report of Master Grossman appears in the record (R. 47-52).

The report of Special Master Grossman was approved over objections of petitioners Slocum and Hart herein, and an order in accordance with its recommendations was entered by the Federal District Court for the Northern District of Illinois, Eastern Division, on August 2, 1938 (R. 52).

On September 7, 1938, the instant proceeding to vacate the Final Decree entered in the Original Proceeding was commenced by petitioners Slocum and Cohn (R. 1). After full argument, the trial court dismissed the Bill on respondents' motions (R. 20). An Amended Bill was filed, in which petitioner Hart joined as plaintiff, which Amended Bill was dismissed on April 10, 1939 (R. 57). On May 20,

1940, the Appellate Court of the State of Illinois, First District, rendered its opinion and entered its order affirming the order and judgment of April 10, 1939, dismissing the Amended Complaint in these proceedings (R. 59, 80-88). The petition for leave to appeal to the Supreme Court of the State of Illinois was denied by the Supreme Court on October 16, 1940 (R. 107).

RESPONDENT'S CONTENTIONS.

With respect to the grounds for certiorari alleged by the petitioners, the contentions of this respondent are as follows:

I.

All constitutional questions have been twice waived by the petitioners.

A. By electing to appeal to the Appellate Court of Illinois, instead of directly to the Supreme Court of Illinois, petitioners have waived their right to raise any questions arising under the United States Constitution. By virtue of such waiver, the petitioners are precluded from raising such questions in this Court and such questions cannot form the basis for a writ of certiorari.

Central Union Telephone Co. v. *City of Edwardsville*, 269 U. S. 190 (1925);
City of Edwardsville v. *Central Union Telephone Co.*, 309 Ill. 482 (1923);
Levy v. *Broadway-Carmen Bldg. Corp.*, 366 Ill. 279, 291 (1937);
The People v. *Terrill*, 362 Ill. 61 (1935);
Van Dyck v. *Ill. Commercial Men's Ass'n*, 358 Ill. 458 (1934);
Ill. Rev. Stats., c. 110 § 199.

B. The contention that the order of the trial court deprived the petitioners of due process of law guaranteed by the Fifth and the Fourteenth Amendments to the Constitution was never urged in the lower court, nor was error with respect thereto assigned on appeal. By such failure so

to act, the petitioners are precluded from raising the constitutional questions in this Court.

Penn. R. R. Co. v. *Ill. Brick Co.*, 297 U. S. 447 (1936);

The Economy Dairy Co. v. *Otto Kerner, et al.*, 371 Ill. 261 (1939);

The Foreman-State National Bank v. *Sistek*, 358 Ill. 525 (1934).

II.

Each of the petitioners was represented in the Original Proceeding fully as a matter of law. The Final Decree in such proceeding was in all respects binding upon them, and the dismissal of the Amended Complaint for failure to state a cause of action was in all respects proper and raises no substantial federal question.

Supreme Tribe of Ben Hur v. *Cauble*, 255 U. S. 356 (1921);

Hartford Life Ins. Co. v. *Barber*, 245 U. S. 146 (1917);

Hansberry v. *Lee* (No. 29 dec. November 12, 1940), 61 S. Ct., 115;

White v. *McQueen*, 360 Ill. 236 (1935);

Miller v. *Rowan*, 251 Ill. 344 (1911);

O'Conner v. *The Board of Trustees*, 247 Ill. 54 (1910);

The Farmers' Loan & Trust Co. v. *Elevated R. R. Co.*, 173 Ill. 439 (1898).

ARGUMENT.

I.

A. All constitutional questions, whether federal or state, have been waived by the election of the petitioners to appeal, in the first instance, to the Appellate Court of the State of Illinois, rather than to the Supreme Court of the State of Illinois. Such constitutional questions cannot, therefore, form the basis for a writ of certiorari.

As a basis for the issuance of the writ of certiorari, the petitioners urge that they have been deprived of due process of law under the Fourteenth and Fifth Amendments to the United States Constitution. Such questions were never raised, argued or considered, either in the trial court or in the Appellate Court of the State of Illinois. They are contrary to, and unsupported by, the record facts. In any event, they have been twice waived by the petitioners.

In prosecuting their appeal to the Appellate Court of the State of Illinois, rather than to the Supreme Court of Illinois, the petitioners have waived their right to raise any constitutional question, whether federal or state. The applicable section of the Revised Statutes of the State of Illinois provides:

> "Appeals shall be taken directly to the Supreme Court in all cases in which a franchise or freehold or the validity of a statute or a construction of the Constitution is involved * * *" (Sec. 199, c. 110, Ill. Rev. Stats.).

Applying that exact provision of the Illinois Practice Act, this Court has held that a constitutional question can

only be raised upon direct appeal to the Supreme Court of Illinois, and that an appeal to the Appellate Court constitutes a waiver of all constitutional questions, both federal and state. *Central Union Telephone Co.* v. *City of Edwardsville*, 269 U. S. 190 (1925) is squarely in point and in all respects controlling. In that case the prohibition of the Constitution of the United States against impairment of a contract was invoked as a defense to an action in debt. From a judgment for the plaintiff the defendant appealed to the Appellate Court of the State of Illinois; there the judgment was affirmed. Leave to appeal was then granted by the Supreme Court of Illinois, but that Court refused to consider the defense urged under the Federal Constitution, saying:

> "All constitutional issues have been waived by taking an appeal to the Appellate Court and such issues are not proper for consideration here." *City of Edwardsville* v. *C. U. Telephone Co.*, 309 Ill. 482, 483-4 (1923).

This Court issued its writ of error to the Supreme Court of Illinois, but subsequently a motion to dismiss the writ of error was granted and the decision of the Supreme Court of Illinois affirmed. In sustaining that holding, this Court said (269 U. S. at 194, 195):

> "The construction of this statute has been uniformly held to be, that where a question involves the Constitution, it must be taken on error or appeal to the Supreme Court, and that if it be taken to the Appellate Court on other grounds, the party taking the appeal or suing out the writ of error shall be held to have waived the constitutional questions. *Indiana Millers Ins. Co.* v. *People*, 170 Ill. 474; *Robson* v. *Doyle*, 191 Ill. 566; *Case* v. *Sullivan*, 222 Ill. 56; *Poe* v. *Ulrey*, 233 Ill. 56; *Haas Co.* v. *Amusement Co.*, 236 Ill. 452; *Scott* v. *Artman*, 237 Ill. 394; *Comm'rs* v. *Shockey*, 238 Ill.

237. The city, therefore, moves to dismiss the writ of error.

* * *

"It seems to us that the practice under the statute of Illinois above quoted is entirely fair. If the litigant has a constitutional question, federal or state, he may take the case directly to the Supreme Court and have that question decided, together with all the other questions in the case, and then if the federal constitutional question is decided against him, he may bring it here by writ of error or application for certiorari. If he elects to take his case to the Appellate Court, he may have the non-constitutional questions considered and decided, but he gives up the right to raise constitutional objections in any court. There is some complaint that counsel could not infer that the constitutional questions referred to in the statute were federal questions, because the Supreme Court of Illinois had not so decided before this case. We have not been able to determine from the Illinois decisions cited above whether any of the constitutional questions held to be waived therein were federal until the present case. It is not, however, a forced or strained interpretation to hold that 'cases * * * in which the validity of a statute or construction of the Constitution is involved' include validity under, or construction of, both constitutions. When so declared by the state court it should bind us unless so unfair or unreasonable in its application to those asserting a federal right as to obstruct it. This is no such case."

The practice so affirmed remains unquestionably the Illinois practice today. *Levy* v. *Broadway-Carmen Bldg Corp.*, 366 Ill. 279, 291 (1937); *The People* v. *Terrill*, 362 Ill. 31 (1935); *Van Dyck* v. *Ill. Commercial Men's Ass'n*, 358 Ill. 458, 464 (1934).

In the latter case the Supreme Court of Illinois said:

> "We are convinced that a question is presented here under the United States Constitution and that if the appeal had been taken to the Appellate Court that question would have been waived."

B. The failure to raise the constitutional question in the trial court and to assign it as error upon appeal constitutes a waiver thereof. Such constitutional questions cannot, therefore, form the basis for a writ of certiorari.

This Court has specifically recognized and approved the repeated holding of the Illinois Supreme Court that a constitutional question is not preserved for review unless "urged in the lower court, the ruling on it preserved in the record, and the error assigned on appeal." *Penn. R. Co.* v. *Ill. Brick Co.*, 297 U. S. 447, 462. In that decision this Court refused to consider the questions arising under the Federal Constitution, but which had not been raised in the trial court, saying:

> "No such question was, by answer, motion or otherwise, expressly raised in the trial court. * * * The Illinois statute requires that in cases involving construction of the Federal Constitution appeals from circuit courts shall be taken directly to the supreme court (citing the statute and cases). And as definitely shown by its decisions, that court will not take jurisdiction unless it appears from the record that the constitutional question was urged in the lower court, and ruling on it preserved in the record and the error assigned on appeal. (Citing *Foreman-State Nat. Bank* v. *Sistek*, 358 Ill. 525, 529-530; 193 N. E. 513. *Hoffman* v. *Sears Community Bank*, 356 Ill. 598, 601; 191 N. E. 280. *Albrecht* v. *Omphghent Township*, 324 Ill. 200, 202; 154 N. E. 898.) While the order of that court transferring the case does not specify the grounds on

which it was based, the petitioner states that the supreme court necessarily held the constitutional questions had not been properly raised and that, on the oral argument, the chief justice stated that the transfer would be made because of petitioner's failure properly to raise and preserve the constitutional questions. The appellate court so understood the grounds and effect of the order and held that by transferring the case the supreme court eliminated the constitutional questions. As the highest court of the State declined to consider them because not raised in the circuit court or presented to it in accordance with practice that unquestionably was well established and reasonable, this court is without jurisdiction to consider either of them. *Chicago, I. & L. Ry. Co.* v. *McGuire,* 196 U. S. 128, 131. *Hulbert* v. *Chicago,* 202 U. S. 275. *Cox* v. *Texas,* 202 U. S. 446, 452. *Louisville & Nashville R. Co.* v. *Woodford,* 234 U. S. 46, 51." *Cf. City of Edwardsville* v. *C. U. Tel. Co.,* 309 Ill. 482, 483-4; *United Gas Company* v. *Texas,* 303 U. S. 123, 139.

No constitutional questions were presented to the trial court by the petitioners.* None were, or could be, presented to the Appellate Court of the State of Illinois. Both by their failure to raise and argue the question before the Chancellor and preserve the record, and their failure to appeal directly to the Supreme Court of Illinois, the petitioners have irrevocably waived all constitutional questions, whether federal or state.

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*The petition for writ of certiorari, at page 8, states that "The Federal question was properly raised." The most cursory examination of the citations to the record in support of that statement will establish how utterly the petitioners have failed to raise or even suggest the existence of the constitutional question, either in the trial court or in the Appellate Court. So also, the petition for leave to appeal to the Supreme Court of the State of Illinois (R. 79-105) makes no mention of their existence.

II.

Even had the correct appellate procedure been followed and the alleged constitutional questions been properly preserved, the order of the trial court dismissing the Amended Complaint was in all respects proper and raises no substantial federal question.

The holding of *Hansberry* v. *Lee,* 61 S. Ct. 115, decided by this Court on November 12, 1940, and relied upon by the petitioners, has no relationship to the instant facts. If the doctrine of "party by representation" has any meaning, the facts of this case necessarily require its application. The petitioners could in no way have been more fully represented in the Original Proceeding. The plaintiff in the Original Proceeding was the Security National Bank of Sheboygan, Wisconsin, holder, as Trustee, of $9,000.00 principal amount of Bonds undeposited with the Bondholders' Committee. It filed the suit as the representative of all other bondholders, and unquestionably directly represented both Cohn and Slocum as the holders of undeposited Bonds, and indirectly represented Hart, as the holder of Bonds deposited with the Bondholders' Committee. In addition, The First National Bank of Chicago, as Successor Trustee, was made a party to the proceedings and actively participated. As Successor Trustee under the Indenture, pursuant to which the Bonds were issued, it also actively and directly represented Cohn and Slocum as the holders of undeposited Bonds, and indirectly represented Hart as the holder of Certificates of Deposit. Moreover, the Bondholders' Committee was made a party defendant and it, too, actively participated. It unquestionably represented Hart, whose Bonds were deposited with it and never withdrawn. Every requirement of due process is satisfied by such complete representation.

Decisions of this Court uniformly recognize that in a proper case persons, members of a class, who have efficient protection and representation in the proceeding are bound by the judgment or decree. *Hansberry* v. *Lee,* No. 29, decided November 12, 1940, 61 S. Ct. 115, 118; *Supreme Tribe of Ben Hur* v. *Cauble,* 255 U. S. 356 (1921); *Hartford Life Ins. Co.* v. *Barber,* 245 U. S. 146 (1917). The Original Proceeding is such a case and it has been so held in two separate proceedings (R. 14, 53-54, 85-86).

There can be no question but that bondholders are not indispensable and necessary parties to a proceeding in which the Trustee and the Bondholders' Committee are parties. For example, in *White* v. *McQueen,* 360 Ill. 236, the Supreme Court said:

> "We will consider first the question whether there is a lack of necessary parties. The general rule is that all persons interested in the subject matter of a suit should be made parties thereto, and that when foreclosure of a mortgage or trust deed is sought, the *cestuis que trustent,* as well as the trustee, should be made parties. To this rule there are, however, two well established exceptions. The first is where the absent parties are properly represented. In such a case it is sufficient to make such representatives parties to the suit. *A trustee under a trust deed represents the interest of the bondholders, and when he is made a party to a suit affecting such interest they are as much bound by the decree rendered in the suit as if they were individually made parties thereto for the reason that their interests receive actual and efficient protection.* (*Hale* v. *Hale,* 146 Ill. 227; Jones on Corporate Bonds and Mortgages, sec. 398.) Another exception

to the general rule arises where the beneficiaries are very numerous, so that the delay and expense of bringing them in becomes oppressive and burdensome. In such case they will not be deemed necessary parties where the trustee representing them is made a party. * * *'' (Italics supplied.)

Moreover, that case stands squarely for the proposition that the bondholders signing Deposit Agreements are represented fully by the persons with whom such Bonds are deposited. This was expressly pointed out by the Court as follows:

"It will be thus seen that the interests of the bondholders not filing deposit agreements were represented by appellants and those who did sign such agreement were represented by appellee. Appellants Hamel, the White Building Corporation, and White as owner of bonds and owner of the equity of redemption as trustee, were parties complainant. Thus all necessary parties are either personally or by representation before the court. We are of the opinion, therefore, that this ground of the demurrer cannot be sustained."

See, also, *Miller* v. *Rowan,* 251 Ill. 344 (1911); *O'Conner* v. *The Board of Trustees,* 247 Ill. 54 (1910); and *The Farmers' Loan & Trust Co.* v. *Elevated R. R. Co.,* 173 Ill. 439 (1898).

Apart entirely from the foregoing, however, the Amended Complaint was dismissed by the trial court for its failure to state a cause of action with respect to any party. The grounds for such dismissal were other than federal, and

the order of dismissal was affirmed by the Appellate Cou
of the State of Illinois, First District, and leave for appe
denied by the Illinois Supreme Court.

CONCLUSION.

The petition for the issuance of a writ of certiorari t
the Appellate Court of the State of Illinois, First Distric
should be denied.

Respectfully submitted,

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Supreme Court, U.
FILED
JAN 2 1941
CHARLES ELMORE CROPLEY
CLERK

No. 620.

IN THE

Supreme Court of the United States

October Term, 1940

LAURA S. K. SLOCUM, A. COHN and MERWIN M. HART,
Petitioners,

vs.

FIRST NATIONAL BANK OF CHICAGO, JOHN C. MEINERS and JOHN C. PARTRIDGE, individually and as members of a Bondholders' Protective Committee under a Deposit Agreement dated December 31, 1931, A. HARRIS, M. ROTHSCHILD, H. H. BAUM, SECURITY NATIONAL BANK OF SHEBOYGAN, WISCONSIN, as Trustee under the Last Will and Testament of Joachim Johann, and A. C. ALLYN & CO., a Delaware Corporation,
Respondents.

BRIEF OF RESPONDENT A. C. ALLYN AND COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

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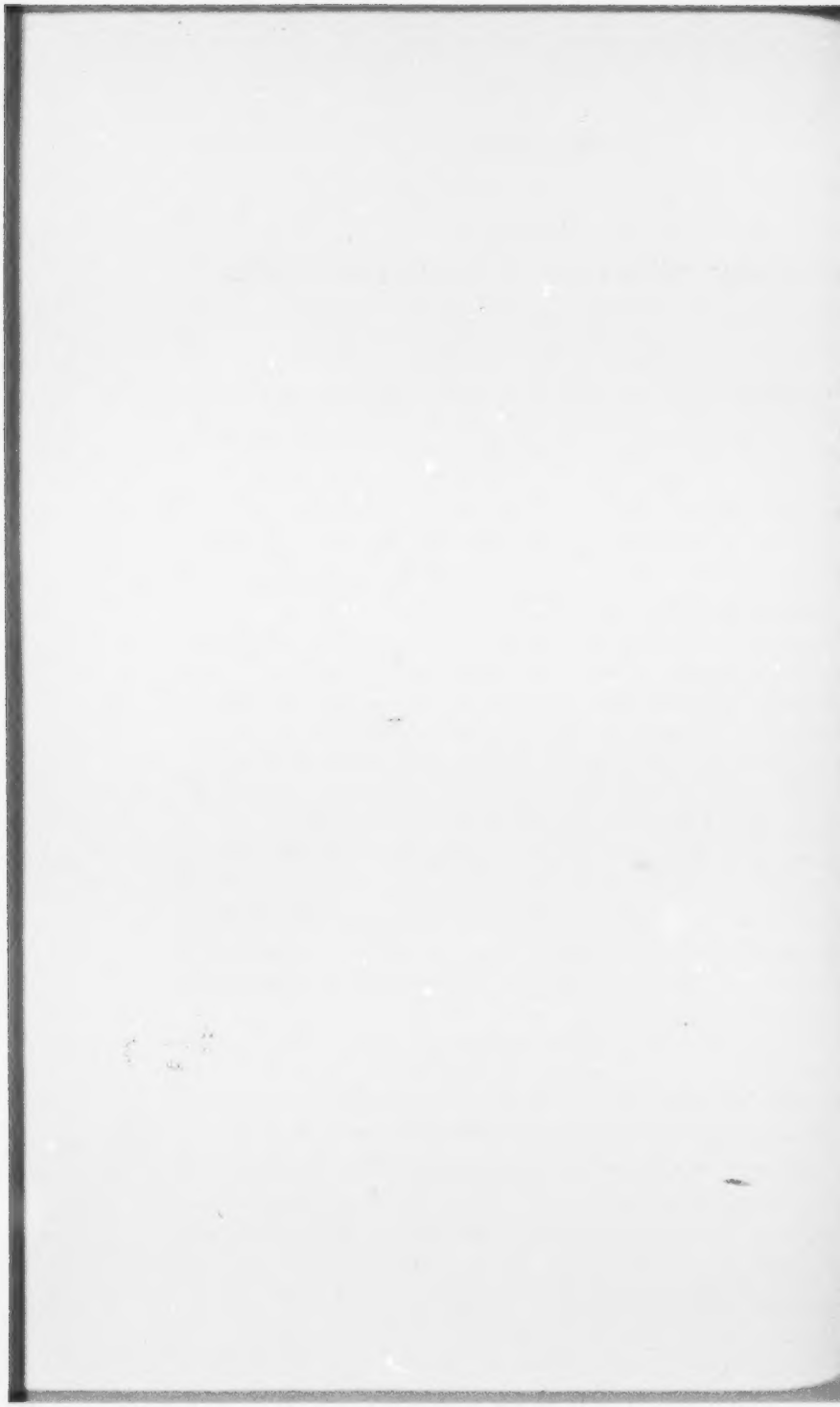

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BRIEF OF RESPONDENT A. C. ALLYN AND COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

OPINIONS BELOW.

The Superior Court of Cook County, Illinois, entered its order from which appeal was taken, without filing written opinion. The order appears in the Record at page 57. The

opinion of the Appellate Court of Illinois, First District, was reported in abstract form at 305 Ill. App. 288, and appears in full in petitioners' Petition to the Supreme Court of Illinois for Leave to Appeal, pages 1-9. Leave to appeal therefrom was denied October 16, 1940, by the Illinois Supreme Court without opinion.

I.

STATEMENT OF THE CASE.

Petitioners instituted suit in the Superior Court of Cook County, Illinois, against 8 different defendants (R. 1) for recovery of damages in connection with defaults occurring on bonds of Ashland Industries Building Corporation in connection with the administration of the trust created by the trust indenture under which said bonds were issued, in connection with the activities of the committee formed for the protection of the holders of said bonds, and so forth, aggregating seven or eight alleged causes of action (R. 1-20). Motions were made by the several defendants to strike and dismiss the bill of complaint upon a number of grounds; on January 18, 1939 the motions to dismiss were sustained, and leave was given to the plaintiffs to amend (R. 20). Thereafter petitioners filed an amended complaint against the same defendants (R. 20-38). Motions to strike and dismiss the amended complaint were again filed by the several defendants upon a number of grounds (R. 39-57). Motion of this respondent to dismiss was, *inter alia,* upon grounds that the amended complaint did not show any duty or obligation upon respondent, *that plaintiffs had not alleged facts sufficient to constitute a valid cause of action nor to support a judgment against it, nor to entitle plaintiffs to the relief sought,* that it did not show that defendant was a party to the action of *Slocum* v. *Rothschild,* described in paragraph 6 of the amended complaint (R. 26), nor to the action of *Security National Bank of Sheboygan,* v. *Roth-*

schild, described in paragraph 8 of the amended complaint (R. 28), and that therefore, as to this respondent, all matters pertaining thereto should be stricken, that as to those actions, the matters therein having been adjudicated, the same were *res judicata,* and further *that the amended complaint failed to comply with certain rules of pleading set forth in subparagraph 2 of Section 33 of the Civil Practice Act of Illinois.* (The motion is set forth in abbreviated form at R. 57.) On April 10, 1939 the Supreme Court of Cook County granted "each and every motion to strike the amended bill of complaint" and ordered the same stricken and the cause dismissed at plaintiffs' cost (R. 57-58).

QUESTION PRESENTED.

The question presented is twofold: 1st, whether the state court in ordering the amended complaint of petitioners to be stricken and the case dismissed, did so upon adequate and sufficient grounds not involving any federal question; and 2nd, if the former be found in the affirmative, whether this Court may, despite such finding, assume jurisdiction of this case should it likewise find a federal question to be involved and to have been properly raised.

II.

SUMMARY OF ARGUMENT.

The amended complaint was ordered by the Superior Court of Cook County, Illinois, to be stricken and the case dismissed upon motion of respondent to strike and dismiss upon grounds, *inter alia,* that it failed to state a cause of action and failed to comply with certain mandatory rules of pleading under the Civil Practice Act of the State of Illinois. The order of the Superior Court fully sustained these grounds for respondent's motion. It was affirmed by the Appellate Court of Illinois, First District, and made final by the refusal of the Illinois Supreme Court to grant leave to appeal.

Each of the grounds above set forth was sufficient to sustain an order striking the amended complaint and dismissing the action, and the action of the state court in connection therewith is not reviewable here. There was, therefore, as to this respondent, no federal question involved, and the jurisdiction of this Court may not be invoked.

ARGUMENT.

1. No grounds exist upon which the jurisdiction of this Court may be invoked.

Section 237b of the Judicial Code (28 U. S. C. A. Sec. 344b) is the authority under which this Court may review the decision of a state court, and is as follows:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest Court of a State in which a decision could be had where is drawn in question the validity of a statute or treaty of the United States, or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States or any treaty or statute of, or commission held or authority exercised under, the United States, and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

This Court has consistently ruled that, since it is only by statutory provision that the Supreme Court of the United States may review a decision of a state court, that Statute must be strictly construed.

Caperton v. *Ballard,* 14 Wall. 238.

In *Caperton* v. *Ballard, supra,* this Court stated at page 241:

> "This Court has repeatedly declared that it is only under the 25th Section of the Judiciary Act that it takes cognizance of error committed in the highest courts of a state."

and further at page 242:

> "It is only through the instrumentality of the statute that the clause of the Constitution which the plaintiff in error relies on, can be invoked for his protection."

The principle above enunciated by this Court has been so consistently followed that no purpose would be served by the citation of additional cases.

Respondent moved to dismiss the amended complaint upon the ground of the failure of the plaintiffs to allege facts sufficient to sustain a cause of action or to support a judgment against respondent, or to otherwise entitle the plaintiffs to the relief sought; respondent likewise moved to dismiss the amended complaint upon the ground of the failure of the amended complaint to comply with the requirements of subparagraph 2 of Section 33 of the Civil Practice Act of Illinois; respondent likewise raised the point that all matters set forth in paragraphs 5, 7 and 17 of the amended complaint (R. 25, 27 and 36) had been adjudicated in the United States District Court and were *res judicata,* and further that all matters contained in paragraphs 6 and 8 to 16, inclusive, of the amended complaint, should be stricken for the reason that plaintiffs had not shown respondent to be a party to the action of *Slocum* v. *Rothschild,* described in paragraph 6, nor to the action of *Security National Bank* v. *Rothschild,* described in paragraph 8, of the amended complaint, to which actions said paragraphs referred. At R. 57 respondent's motion to dismiss is set forth in abbreviated form.

It is obvious that the motion to dismiss for failure to allege facts sufficient to sustain a cause of action or to support a judgment against respondent applies to the entire complaint and is sufficient to bring about the dismissal of the amended complaint and of the action if sustained by the state court.

Subparagraph 2 of Section 33 of the Civil Practice Act of Illinois is as follows:

> "Section 33. (Form of pleadings.) * * *
>
> (2) Each separate claim or cause of action upon which a separate recovery might be had, shall be stated in a separate count or counterclaim, as the case may be, and each count, counterclaim, defense or reply, shall be separately pleaded, designated and numbered, and each shall be divided into paragraphs numbered consecutively, each paragraph containing, as nearly as may be, a separate allegation."

Examination of the above quoted subparagraph 2 of Section 33 shows it to be mandatory and that failure of the plaintiffs to comply with its requirements would likewise constitute sufficient grounds for striking the amended complaint, and dismissing the action. If the Court is disposed to examine the amended complaint (R. 20) it will be obvious that both objections to the pleading raised by respondent were well taken. In this connection it is likewise to be borne in mind that plaintiffs' first complaint had been dismissed by the Superior Court with leave to amend (R. 20).

The attention of the Court is called to the order of the Superior Court, entered April 10, 1939, (R. 57) dismissing the amended complaint, the first paragraph of which states:

> "(1) Each and every motion to strike the amended bill of complaint be and the same is hereby sustained."

The order of the Superior Court of Cook County sustaining all of the motions to strike the amended complaint and dismissing it was fully affirmed by the Appellate Court of Illinois in its ruling:

> "We have presented the affirmative reasons why in our opinion the orders of the Superior Court sustaining the motions to strike plaintiffs' amended complaint and dismissing it were proper, and they are affirmed." (Pet. to Ill. Sup. Ct. 8 and 9.)

It has been consistently maintained by this Court that in order to give this Court jurisdiction over a case decided in the state court it must appear affirmatively by the record not only that a federal question was presented for decision, but that its decision was necessary to the rendition of a decree.

Williams v. *Oliver,* 12 How. 55;
Eustis v. *Bolles,* 150 U. S. 361;
Adams v. *Russell,* 229 U. S. 353.

In *Williams* v. *Oliver, supra,* this Court stated at page 60:

"In order to give jurisdiction to this Court to revise the judgment of a state court, under the 25th Section of the Judiciary Act, a question must not only exist on the record, actually or by necessary intendment, as mentioned in that section and the decision of the court as there stated, but the decision must be controlling in the disposition of the case; or in the language of some of the cases on the subject, 'the judgment of the state court would not have been what it is, if there had not been a misconstruction of some act of Congress, or a decision against the validity of the right, title, privilege or exemption set up under it'. 3 Pet. 292, 302." quoting from Mr. Justice Story's opinion in *Harris* v. *Dennie.*

In *Eustis* v. *Bolles, supra,* this Court stated at page 366:

"It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the latter question is sufficient notwithstanding the Federal question, to sustain the judgment, this Court will not review the judgment."

In *Adams* v. *Russell, supra,* this Court, in holding that where both federal and state questions were raised in the

trial court and the state questions were sufficient to support the decision of the state court, the Supreme Court must assume that the state court based its decision on the state questions, adopted, at page 358, the ruling of this Court in *Eustis* v. *Bolles, supra,* in the following language:

> "In *Eustis* v. *Bolles,* 150 U. S. 361, it is decided that when there is a federal and a state question in the case and the latter is sufficient to sustain the judgment, this Court will not review the judgment."

This Court is without jurisdiction to review the judgment of a state court based not only upon ground involving federal questions, but also upon an independent ground of state procedure involving no federal question and sufficient to sustain a judgment.

People ex rel. Doyle v. *Atwell,* 261 U. S. 590;
Richardson Machinery Co. v. *Scott,* 276 U. S. 128, 133 (1928);
Johnson v. *Thornburg,* 276 U. S. 601 (1928);
Carter Oil Co. v. *Eli,* 277 U. S. 573 (1928);

In *People ex rel. Doyle* v. *Atwell, supra,* this Court stated at page 592:

> "It is well settled law that where the record discloses that the judgment of a state court was based, not alone upon the ground involving a federal question, but also upon another and independent ground, broad enough to maintain the judgment, this Court will *not* take jurisdiction to review such judgment and will dismiss a writ of error brought for that purpose." (Italics ours.)

Where it is not apparent on which ground the judgment of the state court was based, nevertheless if the independent ground was good and valid and sufficient to support the judgment, this Court will not assumejurisdiction.

Klinger v. *Missouri,* 80 U. S. 257 (13 Wall. 257).

In *Klinger* v. *Missouri, supra,* this Court stated, at page 262:

> "For we do not assume jurisdiction to review the judgment of a state court unless it clearly appears from the record that a question has been raised and passed upon which is within the cognizance of this Court * * *".

Again at page 263 the Court states:

> "Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws or treaties of the United States, or upon some other independent ground; and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the federal question, the Court will *not* take jurisdiction of the case even though it might think the position of the state court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment this Court will *not* assume jurisdiction of the case; * * *" (Italics ours.)

The motions to strike certain paragraphs and the plea of *res judicata* as to two of the alleged causes of action set forth in the amended complaint did not and could not constitute sufficient grounds for the striking of the entire amended complaint, and the dismissal of the entire cause of action. It, therefore, is obvious that the state court, even without special phraseology so indicating, must have considered and sustained the other objections raised by respondent. Examination of the opinion of the Appellate Court shows that it did consider the objections raised by respondent and the other defendants to the amended complaint other than *res judicata* and that it sustained them. (Pages 7, 8 and 9 of the opinion of the Appellate Court.)

2. None of the cases cited by petitioners are authority for petitioners to maintain that this Court should take jurisdiction of the instant case.

Examination of the cases cited by petitioners in support of their claim that the jurisdiction of this Court may be invoked shows that in each instance a federal question was passed upon and was the basis of the state court's decision. We shall review part of the cases cited by petitioners briefly.

Cumberland Glass Co. v. *DeWitt,* 37 U. S. 447. In this case three pleas were made by the defendant, one a denial, one a bar of the Statute of Limitations, and third, the bar of a decision of a federal court of bankruptcy as *res judicata.* None of the pleas were sustained. This Court took jurisdiction because of the refusal of the state court to sustain the plea that the decision of the federal bankruptcy court was *res judicata.*

Had either of the first two pleas been sustained, the defense would have been sufficient and the state court's decision would not have been reviewable. Not having been sustained, the refusal by the state court to give effect to the decision of the federal court on the claim of its being *res judicata* was sufficient to invoke the jurisdiction of this Court. In the instant case the petitioners' action was dismissed upon other and independent grounds and the question of whether proper effect was given to decree of the District Court is not before the Court.

Indiana v. *Brand,* 303 U. S. 95. In this case the constitutional question was raised and passed upon by the state court (p. 98). It likewise appears that the state court did not pass upon the first ground of demurrer raised by the defendant, which raised an independent local question. At first blush it would appear that the decision in this case is contrary to the trend of decisions which we have quoted heretofore. Examination of the opinion, however, shows that this Court did not disregard the fact of there being an independent ground for decision and did not hold that

because it had not, apparently, been passed upon by the state court such independent ground might be disregarded. At page 98 this Court states:

> "Where the state court does not decide against the petitioner or appellant upon an independent state ground, but deeming the Federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgment if, as here, it is a final judgment. We cannot refuse jurisdiction because the state court might have based its decision, consistently with the record, upon an independent and adequate non-federal ground. * * * *As the court below has not passed upon one of the grounds of demurrer which appears to involve no federal question, and may present a defense still open to the respondent, we reverse the judgment and remand the cause for further proceedings not inconsistent with this opinion.*" (Italics ours.)

It therefore appears that despite the fact that this Court took jurisdiction of the case, it did not eliminate from consideration the independent question but remanded the case for consideration of that question by the state court.

Stoll v. *Gottlieb,* 305 U. S. 167. This case hinged completely upon the question of whether or not a decision of the Federal District Court should be given effect, the state court's refusal to give it effect made it reviewable in this Court.

Scott v. *McNeal,* 154 U. S. 34. This was a case in which the state court enforced a statute of the state which was repugnant to the Federal Constitution and this Court, of course, held that because the state statute was itself contrary to the Federal Constitution, the decision of the state court in accordance with that statute was reviewable. It is interesting in this connection to note the statement of the Court at page 38:

> "If a statute regulating probate proceedings is itself constitutional, the decision of the state court of last resort that the provisions of such statute have been complied with in a given cause is conclusive."

None of the other cases cited by petitioners in support of their effort to invoke the jurisdiction of this Court differ in theory from the foregoing and so will not be reviewed. None deviated from the long established principle that when the decision of the state court was based upon some ground other than one involving a federal question, sufficient to support the judgment, the jurisdiction of this court may not be invoked.

3. Whether or not the plea of res judicata raised by this respondent was sufficient is, as to it, immaterial to the instant petition.

Examination of the respondent's motion to strike (R. 57) shows that the plea of *res judicata* was raised as to only the alleged causes of action set forth in paragraphs 5, 7 and 17 of the amended complaint (R. 25, 27 and 36), and as an alternative that the matters set forth in paragraphs 6 and 8-16 inclusive (R. 26, 28-36) be stricken, whereas the motion to dismiss for failure to state a cause of action and for failure to comply with the Civil Practice Act of the State of Illinois attacked the entire amended complaint upon grounds sufficient if sustained by the court to require the striking of the amended complaint and the dismissal of the suit. It therefore becomes unnecessary, in view of the decisions of this Court above cited, to discuss the question of whether the plea of *res judicata* was sufficient and whether if it were the only ground upon which the motions to dismiss had been sustained the order of the state court might be reviewed here.

CONCLUSION.

The action of the state court in striking the amended complaint herein and dismissing the case, upon motion of respondent, was upon grounds adequate and sufficient to sustain its order, independent of any grounds involving a federal question and is not reviewable here, and no reason exsits for invoking the jurisdiction of this Court.

We, therefore, urge that the petition for writ of certiorari be denied, with costs.

Respectfully submitted,

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